

5-14-2010

# Printcraft Press v. Sunnyside Park Utilities Clerk's Record v. 3 Dckt. 36556

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Vol. 3 d. 27

LAW CLERK

IN THE

volume 3

SUPREME COURT

OF THE

STATE OF IDAHO

PRINTCRAFT PRESS, INC.

Plaintiff

and

Respondent/Cross Appellant

vs.

SUNNYSIDE PARK UTILITIES, INC., etal

Defendant

and

Appellant/Cross Respondent

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Joel E. Tingey, District Judge

Mark Fuller P.O. Box 50935, Idaho Falls, ID 83405

Bryan Smith P.O. Box 50731, Idaho Falls, ID 83405  
*Attorney's for Appellant-Cross Respondents*

Michael Gaffney 2105 Coronado, Idaho Falls, ID 83404-7495

*Attorney for Respondent-Cross Appellant*

FILED - COPY

Filed this 4 day of MAY, 2010

365556

36567

Clerk

Deputy

COPY

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IDAHO FALLS, IDAHO 83405-0935  
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ATTORNEY FOR DEFENDANT SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation, )	
Plaintiff, )	
v. )	<b>DEFENDANT SUNNYSIDE INDUSTRIAL</b>
SUNNYSIDE UTILITIES, INC., an Idaho )	<b>AND PROFESSIONAL PARK'S MOTION</b>
corporation, )	<b>FOR SUMMARY JUDGMENT</b>
SUNNYSIDE PARK )	
OWNERS ASSOCIATION, INC., an )	
Idaho corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation, )	
Defendants. )	
_____ )	

COMES NOW, the Defendant, Sunnyside Industrial and Professional Park, an Idaho limited liability corporation ("SIPP"), through its counsel of record, Mark R. Fuller of Fuller & Carr, and moves the Court pursuant to IRCP 56(b) for Summary Judgment on all of Plaintiff's Causes of Action.

SIPP is entitled to Summary Judgment on Printcraft's Cause of Action for Breach of Contract because:

(1) SIPP is not a party to the Third Party Beneficiary Utility Agreement;

(2) Printcraft Press, Inc. (hereafter "Printcraft") materially breached the Rules and Regulations for sewer service and violated State and Federal law, therefore any disconnection of the sewer services to Printcraft was justified and was not a Breach of Contract; and


(3) Printcraft is merely an incidental beneficiary under the Third Party Utility Agreement and has no rights to maintain an action for Breach of Contract.

SIPP is entitled to Summary Judgment on Printcraft's Cause of Action for Failure to Disclose and/or Misrepresentation and Printcraft's Two Causes of Action for Constructive Fraud because:

- (1) SIPP had no duty to disclose;
- (2) Any alleged non-disclosures were not material to Printcraft's decision to enter into an oral, month-to-month sub-lease agreement with CTR Management, LLC;
- (3) Printcraft did not rely on any alleged non-disclosures; and
- (4) Printcraft's alleged damages were not caused by any alleged non-disclosures.

The Motion is based upon this Motion, the Notice of Hearing, the Brief in Support of Sunnyside Industrial and Professional Park, Inc.'s Motion for Summary Judgment, the Discovery Responses filed with the Court, the Affidavit of Kirk Woolf, and Sunnyside Park Utilities' Brief in Support of Motion for Summary Judgment, with all supporting documentation provided therewith.

DATED this 19 day of July, 2007.

  
\_\_\_\_\_  
Mark R. Fuller  
Fuller & Carr

DEFENDANT SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK'S  
MOTION FOR SUMMARY JUDGMENT - 2

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of

July, 2007:

Document Served:

DEFENDANT SUNNYSIDE INDUSTRIAL  
AND PROFESSIONAL PARK'S MOTION  
FOR SUMMARY JUDGMENT

Attorney Served:

Lane Erickson, Esq.  
Patrick N. George, Esq.  
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☐ Facsimile  
☒ Hand Delivery



Mark R. Fuller  
FULLER & CARR

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2007 JUL 19 PM 3:53

CLERK OF DISTRICT COURT  
IDAHO FALLS, IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation, )	
Plaintiff, )	<b>BRIEF IN SUPPORT OF</b>
v. )	<b>DEFENDANT SUNNYSIDE INDUSTRIAL</b>
SUNNYSIDE UTILITIES, INC., an Idaho )	<b>AND PROFESSIONAL PARK'S MOTION</b>
corporation, )	<b>FOR SUMMARY JUDGMENT</b>
SUNNYSIDE PARK )	
OWNERS ASSOCIATION, INC., an )	
Idaho corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation, )	
Defendants. )	
_____ )	

COMES NOW, the Defendant, Sunnyside Industrial and Professional Park, an Idaho limited liability corporation ("SIPP"), through its counsel of record, Mark R. Fuller of Fuller & Carr, and submits this Brief in Support of Defendant Sunnyside Industrial and Professional Park's Motion for Summary Judgment.

**STATEMENT OF UNDISPUTED FACTS**

1. On August 4, 1999 Defendant SIPP entered into a "Development Agreement" with

DEFENDANT SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK'S  
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1

Bonneville County wherein it was agreed that the individual owner(s) of property located in the subdivision would be responsible for construction of any utility or street improvements. See Development Agreement, paragraph 6, attached as Exhibit "C" to Plaintiff's First Amended Complaint.

2. The Development Agreement was recorded on the records of Bonneville County on August 4, 1999. *Id.*
3. On December 23, 1999, the Defendant SIPP transferred the property now known as Block 1, Lot 5 of the Sunnyside Industrial and Professional Park by warranty deed to Miskin Scraper Works, Inc. See Plaintiff's First Amended Complaint, para. 24 (A).
4. Defendant SIPP was not a party to the Third Party Beneficiary Utility Agreement. *Id.* See also Third Party Beneficiary Utility Agreement, attached as Exhibit "D" to Plaintiff's First Amended Complaint.
5. Defendant SIPP incorporates by reference and re-alleges the Statement of Facts set forth by Sunnyside Park Utilities, Inc., in its Brief in Support of Motion for Summary Judgment, as if set forth fully herein.

#### **STANDARD ON MOTION FOR SUMMARY JUDGMENT**

Defendant SIPP incorporates by reference and re-alleges the Standard on Motion for Summary Judgment set forth by Sunnyside Park Utilities, Inc., in its Brief in Support of Motion for Summary Judgment, as if set forth fully herein.

#### **ARGUMENT**

##### **I. BREACH OF THIRD PARTY UTILITY AGREEMENT**

### **A. Defendant SIPP is not a party to the Third Party Utility Agreement**

Plaintiff's Cause of Action for Breach of the Third Party Utility Agreement must fail against Defendant SIPP because SIPP was not a party to such agreement and SIPP has no obligation to provide any sewer services to any of the owners of the Sunnyside Industrial and Professional Park subdivision. The Third Party Beneficiary Utility Agreement Printcraft seeks to enforce was made "by and between Sunnyside Park Utilities, Inc.,...and Sunnyside Park Owners Association, Inc." See Third Party Beneficiary Utility Agreement, pg. 1.

Printcraft mistakenly asserts that all of the Defendants, including SIPP, were providing sewer services to the building occupied by Printcraft. See First Amended Complaint, para. 61. However, Printcraft also acknowledges that "Defendant Sunnyside Park Utilities, Inc., and the Defendant Sunnyside Park Owners Association, Inc., entered into a Third Party Beneficiary Utility Agreement." Despite acknowledging that SIPP was not a party to the contract that Printcraft is attempting to enforce, Printcraft claims it was damaged by SIPP and entitled to recovery against SIPP under the contract. See First Amended Complaint, para. 72.

In Idaho Courts have stated that: "A third party beneficiary in an ordinary contract, is subject to the limitation of its terms as he has no greater rights under it than are provided in the contract itself." *Downing v. Travelers Ins. Co.*, 107 Idaho 511, 525, 691 P.2d 375 (1984). Other courts have similarly stated: "[A]s a matter of general law[,] a third-party beneficiary stands in the shoes of the promisee and is subject to all defenses that might have been asserted against the promisee." *Saylab v. Don Juan Restaurant*,



*Inc.*, 332 F.Supp.2d 134, n. 8 (D.C. 2004). The Third Party Beneficiary Agreement does not contain any terms that would entitle any party, third party beneficiary, or anyone else to sewer services from SIPP. As a result, any refusal or failure of SIPP to provide Printcraft with sewer services would not be a breach of contract by SIPP.

Because the contract between SPOA and Sunnyside Utilities does not obligate SIPP to provide sewer services to anyone, Printcraft's cause of action against SIPP based on an alleged breach of the Third Party Beneficiary Utility Agreement must fail. SIPP is entitled to Summary Judgment on Printcraft's cause of action for Breach of the Third Party Beneficiary Utility Agreement.

**B. Plaintiff is not entitled to enforce the Third Party Utility Agreement because (1) Plaintiff breached the terms of the Agreement applicable to Plaintiff and (2) Plaintiff is merely an incidental beneficiary of the Agreement**

Defendant SIPP re-alleges and incorporates Defendant Sunnyside Utilities' argument regarding the Third Party Beneficiary Utility Agreement contained in Sunnyside Utilities' Memorandum in Support of Motion for Summary Judgment as if set forth fully herein. Because Printcraft breached the terms of the Third Party Beneficiary Agreement and Printcraft is at most an incidental beneficiary of the Agreement, Defendant SIPP is entitled to Summary Judgment on Printcraft's claim for Breach of Third Party Beneficiary Agreement against this Defendant.

**II. FAILURE TO DISCLOSE AND/OR MISREPRESENTATION AND CONSTRUCTIVE FRAUD**

SIPP re-alleges and incorporates by reference the argument concerning Failure to Disclose and/or Misrepresentation and Constructive Fraud argued in Sunnyside Utilities'

Brief in Support of Motion for Summary Judgment as if set forth fully herein.

In addition to the facts and argument set forth in Sunnyside Utilities' Briefing, Printcraft's Cause of Action for Failure to Disclose and/or Misrepresentation and Printcraft's two Causes of Action for Constructive Fraud against Defendant SIPP must fail because SIPP had no duty to speak. SIPP is not a party to the Third Party Beneficiary Agreement. See Third Party Beneficiary Agreement. SIPP sold the property to Miskin in 1999, however, SIPP had no duty to disclose any limitations to Miskin regarding the sewer facilities because SIPP had already agreed with Bonneville County that the owners of the property would be responsible for their own sewer. See Development Agreement.

SIPP is entitled to Summary Judgment on Printcraft's Cause of Action for Non-Disclosure and/or Misrepresentation and Printcraft's Two Causes of Action for Constructive Fraud.

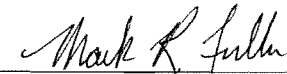
### **CONCLUSION**

Printcraft Press is not entitled to enforce or collect damages for a breach of the Third Party Beneficiary Utility Agreement against SIPP because (1) SIPP was not a party to the Agreement and cannot be in breach; (2) there is no issue of material fact that Printcraft breached the terms of the agreement ; and (3) Printcraft is at most an incidental beneficiary of the agreement. Therefore, SIPP is entitled to Summary Judgment on Printcraft's cause of action for Breach of the Third Party Utility Agreement.

Printcraft Press is not entitled to recovery for its causes of action for non-disclosure and/or misrepresentation or constructive fraud because (1) SIPP had no duty to disclose any information to Printcraft; (2) any non-disclosure was not material to Printcraft's

decision to enter into an oral month-to-month lease with CTR Management; (2) Printcraft did not rely upon or was not entitled to rely upon the alleged non-disclosure of information; and (3) Printcraft's alleged damages are not the direct and proximate result of the non-disclosure of information.

DATED this 19 day of July, 2007.



Mark R. Fuller  
Fuller & Carr

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of July, 2007:


Document Served:

DEFENDANT SUNNYSIDE INDUSTRIAL  
AND PROFESSIONAL PARK'S BRIEF IN  
SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT

Attorney Served:

Lane Erickson, Esq.  
Mitchell Brown, Esq.  
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☒ Hand Delivery

  
\_\_\_\_\_  
Mark R. Fuller  
FULLER & CARR

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2007 JUL 19 P. 3:53

CLERK  
DIVISION  
COUNTY

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK OWNERS ASSOCIATION, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an Idaho )  
corporation, )

Plaintiff, )

v. )

SUNNYSIDE UTILITIES, INC., an Idaho )  
corporation, )  
SUNNYSIDE PARK )  
OWNERS ASSOCIATION, INC., an )  
Idaho corporation, and )  
SUNNYSIDE )  
INDUSTRIAL AND PROFESSIONAL )  
PARK, LLC, an Idaho limited liability )  
corporation, )

Defendants. )

**Case No. CV-06-7097**

**AFFIDAVIT OF KIRK WOOLF**

STATE OF IDAHO )  
 ) ss.  
County of Bonneville )

Kirk Woolf, being first duly sworn upon his oath states  
and alleges as follows:

1. Affiant is a resident of Bonneville County, State

AFFIDAVIT OF KIRK WOOLF - 1

of Idaho and executes this Affidavit upon his personal knowledge.

2. Affiant is an officer of Sunnyside Park Owners' Association, Inc.

3. Neither Printcraft Press, nor any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park subdivision are members of the Sunnyside Park Owners' Association, Inc.

4. Neither Printcraft, nor any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park subdivision have ever paid any type of consideration to Sunnyside Park Owners' Association, Inc.

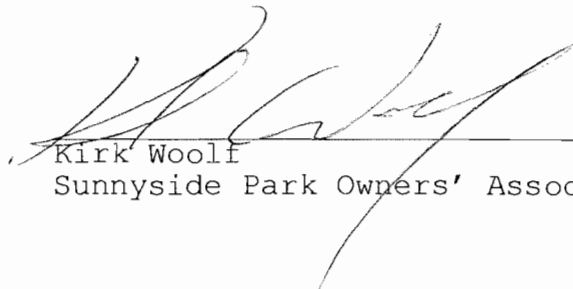
5. Sunnyside Park Owners' Association, Inc. has never promised sewer services to either Printcraft Press or any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park.

6. Sunnyside Park Owners' Association, Inc. has never provided sewer services to either Printcraft Press or any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park.

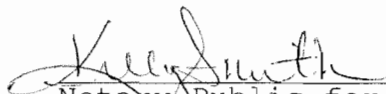
7. Sunnyside Park Owners' Association, Inc. does not own or operate any facilities to provide sewer services to anyone, nor has Sunnyside Park Owners' Association, Inc., ever owned or operated any sewer facilities.

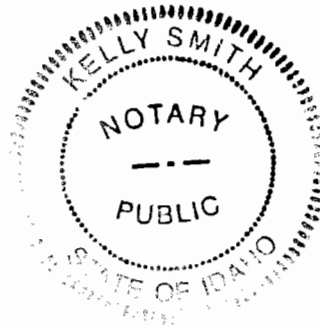
8. Further this Affiant sayeth naught.

DATED this 18<sup>th</sup> day of July, 2007.

  
Kirk Woolf  
Sunnyside Park Owners' Association

SUBSCRIBED AND SWORN to before me this 18<sup>th</sup> day of  
July, 2007.

  
Notary Public for Idaho  
Residing at: B. gby  
My Commission Expires: 06-28-2011



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this 19 day of July, 2007:

Document Served:

AFFIDAVIT OF KIRK WOOLF

Attorneys Served:

Lane Erickson, Esq.  
Mitchell Brown, Esq.  
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P.O. Box 1391  
Pocatello, ID 83204

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       Facsimile  
  x   Hand Delivery

Mark R. Fuller

Mark R. Fuller  
FULLER & CARR



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2007 JUL 19 11 34 53  
CLERK OF DISTRICT COURT  
IDAHO FALLS, IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK OWNERS ASSOCIATION, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation,	)
	)
Plaintiff,	)
	)
v.	)
	)
SUNNYSIDE UTILITIES, INC., an Idaho )	<b>SUNNYSIDE PARK OWNERS</b>
corporation, SUNNYSIDE PARK )	<b>ASSOCIATION'S MOTION FOR</b>
OWNERS ASSOCIATION, INC., an )	<b>SUMMARY JUDGMENT</b>
Idaho corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation,	)
	)
Defendants.	)
_____	)

COMES NOW, the Defendant, Sunnyside Park Owners Association, Inc., an Idaho Corporation ("SPOA"), through its counsel of record, Mark R. Fuller of Fuller & Carr, and moves the Court pursuant to IRCP 56(b) for Summary Judgment on Plaintiff's causes of action for Breach of Third Party Beneficiary Contract, Failure to Disclose and/or Misrepresentation, and two causes of action for Constructive Fraud.

SPOA is entitled to Summary Judgment on Printcraft's Cause of Action for Breach

of Contract because:

(1) SPOA has no obligation to provide anyone with sewer services under the Third Party Beneficiary Utility Agreement, therefore failure by SPOA to provide sewer services was not a Breach of Contract;

(2) Printcraft Press, Inc. (hereafter "Printcraft") materially breached the Rules and Regulations for sewer service and violated State and Federal law, therefore any disconnection of the sewer services to Printcraft was justified and was not a Breach of Contract; and

(3) Printcraft is merely an incidental beneficiary under the Third Party Utility Agreement and has no rights to maintain an action for Breach of Contract.

SPOA is entitled to Summary Judgment on Printcraft's Cause of Action for Failure to Disclose and/or Misrepresentation and Printcraft's Two Causes of Action for Constructive Fraud because:

(1) SPOA had no duty to disclose;

(2) Any alleged non-disclosures were not material to Printcraft's decision to enter into an oral, month-to-month sub-lease agreement with CTR Management, LLC;

(3) Printcraft did not rely on any alleged non-disclosures; and

(4) Printcraft's alleged damages were not caused by any alleged non-disclosures.

The Motion is based upon this Motion, the Notice of Hearing, the Brief in Support of Sunnyside Park Owners' Association, Inc.'s Motion for Summary Judgment, the Discovery Responses filed with the Court, the Affidavit of Kirk Woolf, and Sunnyside Park Utilities' Brief in Support of Motion for Summary Judgment, with all supporting

documentation provided therewith.

DATED this 19 day of July, 2007.



---

Mark R. Fuller  
Fuller & Carr

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of July, 2007:

Document Served:

DEFENDANT SUNNYSIDE PARK  
OWNERS' ASSOCIATION, INC.'S  
MOTION FOR SUMMARY JUDGMENT

Attorney Served:

Lane Erickson, Esq.  
Patrick N. George, Esq.  
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2007 JUL 12 PM 2:53  
CLERK OF DISTRICT COURT  
IDAHO FALLS, IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK UTILITIES, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINTCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation, )	
Plaintiff, )	<b>BRIEF IN SUPPORT OF DEFENDANT</b>
v. )	<b>SUNNYSIDE PARK UTILITIES MOTION</b>
SUNNYSIDE UTILITIES, INC., an Idaho )	<b>FOR SUMMARY JUDGMENT</b>
corporation, )	
SUNNYSIDE PARK )	
OWNERS ASSOCIATION, INC., an )	
Idaho corporation, and )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation, )	
Defendants. )	
_____ )	

COMES NOW, the Defendant, Sunnyside Park Utilities, Inc., an Idaho corporation ("Sunnyside Utilities"), through its counsel of record, Mark R. Fuller of Fuller & Carr, and submits this Brief in Support of Defendant Sunnyside Park Utilities' Motion for Summary Judgment.

**STATEMENT OF FACTS**

1. On or about April 16, 2002, Sunnyside Utilities, entered into an agreement titled

"Third Party Beneficiary Utility Agreement" with the Defendant Sunnyside Park Owners Association, Inc. (hereafter "SPOA"), for Sunnyside Utilities to provide water and sewer services to Defendant SPOA and its members. See Plaintiff's First Amended Complaint, para. 18.

2. On September 12, 2005, CTR Development, LLC (hereafter "CTR Development") owned Block 1, Lot 5 of the Sunnyside Industrial and Professional Park subdivision (hereafter "Block 1, Lot 5"). *Id.*, para. 24 (C).
3. On or about September 12, 2005, CTR Development, paid Sunnyside Utilities a sewer connection fee in the amount of \$1,800.00 and Sunnyside Utilities allowed CTR Development to connect Block 1, Lot 5 to Sunnyside Utilities' sewer lines. *Id.*, para. 25.
4. On or about January 23, 2006, CTR Development transferred Block 1, Lot 5 to J&LB Properties. *Id.*, para. 24 (D). J&LB Properties is the current owner of Block 1, Lot 5.
5. On or about January 23, 2006, J&LB Properties entered into a written lease agreement with CTR Management, LLC (hereafter "CTR Management") for use of the building located on Block 1, Lot 5. *Id.*, para. 26.
6. The lease agreement between J&LB Properties, as lessor, and CTR Management, as lessee, specifically provides that: "Lessee shall furnish and timely pay for all heat, gas, electricity, power, water, hot water, lights, telephone, and all other utilities of every type and nature whatsoever used in or about the Leased Premises at Lessee's own cost and expense...**Lessor shall be under no obligation to**

**furnish or pay for any of such utilities.”** See Lease Agreement, attached as Exhibit “J” to First Amended Complaint. (Emphasis Added).

7. On or after January 23, 2006, Printcraft entered into an oral month-to-month sub-lease agreement with CTR Management, wherein Printcraft agreed to sub-lease the building on Block 1, Lot 5 from CTR Management. *Id.*, para. 26.
8. Printcraft has never purchased any property from Sunnyside Utilities. See Affidavit of Doyle Beck, para. 3.
9. Printcraft did not pay any connection fee for the sewer services to Sunnyside Utilities. See Affidavit of Doyle Beck, para. 4.
10. Printcraft made no investigation regarding the types of sewer services Sunnyside Utilities was capable of providing, either prior to construction of the building or before Printcraft began occupancy. See Printcraft Press deposition., pg. 109, ln. 15-24.
11. Printcraft never informed Sunnyside Utilities about any of the types or quantities of waste Printcraft intended to discharge into Sunnyside’s septic system. *Id.*, pg. 119, ln. 10-17 (“**Q.** Did Printcraft inform Sunnyside about the types and quantities of waste Printcraft intended to discharge into Sunnyside’s septic system? **A.** No. **Q.** What was Sunnyside told by Printcraft, if anything, would be discharged? **A.** Nothing”). See *a/so* Printcraft Depo., pg. 165, ln. 21 through pg. 166, ln. 3. (“**Q.** Did Printcraft ever identify to Sunnyside any of the chemicals that were being discharged into Sunnyside’s sewer service prior to disconnection? **A.** In Printcraft’s history, I don’t remember ever telling the City of Idaho Falls, our own septic

- system, or anything, or Sunnyside what was going down the drain.”)
12. Sunnyside Utilities never promised any type or quantity of sewer services to Printcraft before Printcraft began occupancy of the building. See Printcraft Depo., pg. 109, ln. 25 through pg. 110, ln. 2.
  13. Printcraft proceeded to discharge water softener brine, hazardous wastes, wastes that are harmful to Sunnyside’s sewer system, processed water, excessive flows of wastewater, in addition to other substances prohibited by Sunnyside Utilities’ Rules and Regulations. See Memorandum in Support of Defendant’s Second Motion for Summary Judgment. See *also* Order RE: Pending Motions entered July 3, 2007, pg. 1. para. 1.
  14. Printcraft’s discharges were in violation of State and Federal rules and regulations. *Id.*
  15. On June 9, 2006, the sewer system operated by Sunnyside Utilities overflowed and Sunnyside immediately informed District Seven Health Department of the overload. See First Amended Complaint. para. 33.
  16. On or about July 2, 2006, District Seven Health Department physically inspected the installation of the expansion and repair of the septic system. *Id.* para. 37.
  17. On December 15, 2006 Sunnyside Utilities severed the sewer connection to Block 1, Lot 5. *Id.* para. 53.

#### **STANDARD ON MOTION FOR SUMMARY JUDGMENT**

This Court’s standard in considering Defendant’s Motion for Partial Summary Judgment was addressed in G & M Farms v. Funck Irr. Co., 119 Id. 514, 808 P.2d 851



(1991):

It is well established that “[A] motion for summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” IRCP 56(c); Olson v. Freeman, 117 Idaho 706, 791 P.2d 1285 (1990); Rawson v. United Steelworkers of Am., 111 Idaho 630, 726 P.2d 742 (1986); Boise Car & Truck v. Waco, 108 Idaho 780, 702 P.2d 818 (1985); Schaefer v. Elswood Trailer Sales, 95 Idaho 654, 516 P.2d 1168 (1973). Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. Tusch Enters. v. Coffin, 113 Idaho 37, 740 P.2d 1022 (1987); Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Kline v. Clinton, 103 Idaho 116, 645 P.2d 350 (1982). Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. Tusch Enters. v. Coffin, 113 Idaho 37, 740 P.2d 1022 (1987); Doe V. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass’n, Inc., 105 Idaho 509, 670 P.2d 1294 (1983); Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982); Kline v. Clinton, 103 Idaho 116, 645 P.2d 350 (1982). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. Petricevich v. Salmon River Canal Company, 92 Idaho 865, 452 P.2d 362 (1969). However, the plaintiff’s case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue. Id. See also Nelson v. Steer, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. Kline v. Clinton, 103 Idaho 116, 645 P.2d 350 (1982); Farmer’s Ins. Co. of Idaho v. Brown, 97 Idaho 380, 544 P.2d 1150 (1976). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Ashby v. Hubbard, 100 Idaho 67, 593 P.2d 402 (1979).

119 Id. at 516-7. If any genuine issue of material fact remains, after all reasonable inferences have been made in favor of the non-moving party, the Motion for Summary Judgment must be denied.

Under Rule 56(a), the moving party has the initial burden of showing that it is

entitled to judgment. In Celotex Corp. v. Catrett, 477 US 317, 106 S. Ct. 2548 (1986) the Supreme Court held that a party moving for Summary Judgment, and not bearing the burden of proof at trial, need not negate the opposing party's case. Rather, the moving party could discharge its initial burden by demonstrating the absence of an essential element of the case of the opponent, who bears the burden of proof at trial. The Supreme Court in Celotex, supra, stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 US at 321, 106 S.Ct. at 2552. "The language and reasoning of Celotex has been adopted by the Appellate Courts of Idaho." Dunnick v. Elder, 126 Id. 308, 312, 882 P.2d 475 (Ct. App. 1994).

## **ARGUMENT**

### **I. BREACH OF THIRD PARTY BENEFICIARY UTILITY AGREEMENT**

#### **A. Defendant has not breached the Third Party Beneficiary Utility Agreement**

Plaintiff's Cause of Action for Breach of the Third Party Utility Agreement must fail against all of the Defendants because none of the Defendants breached the Third Party Beneficiary Utility Agreement. Plaintiff violated state and federal law and has breached the Rules and Regulations, thereby justifying disconnection of the sewer system by Sunnyside Utilities. This Court has already determined that there are no issues of material

fact that Printcraft violated state and federal law and that Printcraft persistently violated Sunnyside Utilities Rules and Regulations for sewer service by discharging water softener brine, hazardous wastes, wastes that are harmful to Sunnyside's sewer system, processed water, excessive flows of wastewater, in addition to other substances prohibited by the Rules and Regulations. See Order RE: Pending Motions, entered July 3, 2007, pg. 1, para. 1.

In *Bantz v. Nutual of Enumclaw Ins.*, the Court stated: "[w]e conclude that a third party beneficiary...must comply with all the terms and provisions...which apply to that beneficiary. **It would be manifestly unfair to allow a third party beneficiary to collect the benefits...without fulfilling the obligations therein.**" 124 Idaho 780, 785, 124 Idaho 780 (1993) (Emphasis added). The Idaho Supreme Court continues to uphold *Bantz*, stating "*Bantz* illustrates this Court's position that a third-party beneficiary must comply with all the terms and provisions of an agreement to the same extent as they apply to the beneficiary." *Tolley v. THI Co.*, 140 Idaho 253, 262, 92 P.3d 253 (2004) (quoting *Lewis v. CEDU Educational Services, Inc.*, 15 P.3d 1147, 135 Idaho 139 (2000)).

Sunnyside Utilities' Rules and Regulations were entered into pursuant to the Third Party Beneficiary Utility Agreement. See Third Party Beneficiary Utility Agreement, Section 6. The Rules and Regulations specifically allow Sunnyside Utilities to disconnect the sewer connection and refuse to accept sewage from persistent violators of the Rules and Regulations. See Rules and Regulations, Article IV, Section 3.

There is no issue of material fact that Printcraft persistently violated the Rules and Regulations and violated applicable state and federal rules and regulations. By its

breaches of the Rules and Regulations and its violation of applicable state and federal rules and regulations, Printcraft forfeited any right it may have had to enforce the Third Party Beneficiary Agreement as a beneficiary. It would be manifestly unfair for Printcraft to receive the benefits of the Agreement, while persistently breaching the terms and conditions of the Agreement. Because of Printcraft's illegal discharges, Sunnyside Utilities was entitled to sever the sewer connection in order to protect the sewer system and Sunnyside Utilities' other customers, as was provided for in the Rules and Regulations. Sunnyside Utilities did not breach the agreement by removing the sewer connection under such circumstances. Therefore, the Court should grant Summary Judgment in favor of all the Defendants and against Printcraft on Printcraft's Cause of Action for Breach of the Third Party Beneficiary Agreement.

**B. Printcraft is an incidental beneficiary of the Third Party Beneficiary Agreement.**

Printcraft is not entitled to enforce the Agreement because Printcraft is a mere incidental beneficiary of the Agreement. Printcraft is only an incidental beneficiary of the Agreement because it belongs to a limitless and vague class of parties described in the Third Party Beneficiary Utility Agreement.

In Idaho, there are two types of beneficiaries to third party beneficiary contracts: (1) intended beneficiaries and (2) incidental beneficiaries. Only intended beneficiaries are entitled to recovery for a breach of a contract. See Idaho Code §29-102. Idaho Courts have stated that "before recovery can be had by a third party beneficiary, it must be shown that the contract was made for his direct benefit, or as sometimes stated primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary." *Sharp*

*v. W.H.Moore, Inc.*, 118 Idaho 297, 305, 796 P.2d 506 (1990) (See also *Idaho Power Co. v. Hulet*, 140 Idaho 110, 113, 90 P.3d 335 (2004). The Court in *Sharp* further clarified the distinction between an intended beneficiary and an incidental beneficiary by stating: “A third party may only enforce a contract ‘if he can show he is a member of a **limited class** for whose benefit it was made.’” *Id.* (Emphasis Added); see also *Just’s, Inc. v. Arrington Const. Co.*, 99 Idaho 462, 466, 583 P.2d 997 (1978) (“These provisions impose a contractual obligation on the defendant to take specific steps to prevent undue injury to a **well defined and limited class** of third parties.”).

In order to recover, Printcraft must show that it is a member of a “well defined and limited class” of third parties. A “limited class,” for purposes of a Third Party Beneficiary analysis, is defined as follows:

The class may be limited either by a narrow description of the injuries to be guarded against and the damages to be paid, or by a similar description of the class to be protected. Where the group to be benefited is **large and vaguely defined**, individual members are no more than incidental beneficiaries and no rights are created by virtue of the contract.

*Stewart v. Arrington Construction Company*, 92 Idaho 526, (1968) (citations omitted; emphasis added).

Printcraft is merely an individual member of a limitless and vaguely defined class of beneficiaries described in the Third Party Beneficiary Utility Agreement. Printcraft belongs, at most, to the following class benefited by the Third Party Beneficiary Utility Agreement: “future owners or occupants of all and each of the properties, buildings, and other improvements which...may hereafter be served by the...sewage systems of the Company.” Printcraft falls into this class because Block 1, Lot 5 was not provided sewer

service until September of 2005, more than three years after the Agreement was entered into between Sunnyside Utilities and SPOA. See Plaintiff's First Amended Complaint, para. 25. The Third Party Beneficiary Agreement, on multiple occasions, refers to both service by the Company's "sewage systems" (in the plural) and service to "subdivisions" (also plural). See Agreement. There is no limit on the number of sewage systems operated or the subdivisions which may one day be served by Sunnyside Utilities.

Because Printcraft is merely a member of a limitless and vaguely defined class, Printcraft is no more than an incidental beneficiary of the Third Party Beneficiary Utility Agreement. Printcraft has no standing to sue under the Agreement and has no right to any recovery for an alleged breach of the Agreement. Defendant Sunnyside Utilities is entitled to Summary Judgment on Printcraft's cause of action for Breach of Third Party Beneficiary Utility Agreement.

## **II. FAILURE TO DISCLOSE AND/OR MISREPRESENTATION AND CONSTRUCTIVE FRAUD**

The elements of actionable fraud or misrepresentation are as follows:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

*Faw v. Greenwood*, 101 Idaho 387 (1980). In addition, "[f]raud may be established by silence where the defendant had a duty to speak." *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514 (1991). "The absence of any one of the elements is fatal to recovery." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380 (2005).

In addition, Idaho Courts have stated the following regarding constructive fraud:

"An action in constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20 (1997). Under a constructive fraud analysis, eight of the nine elements of fraud must still be proven. *Country Cove Development, Inc., v. Myron*, 143 Idaho 595, (2006) "The gist of a constructive fraud finding is to avoid the need to prove intent (i.e., knowledge of falsity or intent to induce reliance), since it is inferred directly from the relationship and the breach." *Id.*

Printcraft has alleged the Defendants' failure to disclose: (1) that District Seven Health Department provided a sewage permit in 1996 allowing connection of one or two buildings; (2) District Seven Health Department's April 15, 2002 letter stating that no new sewer connections were to be made to the existing system; (3) the size of the sewer system and the system's limitations; and (4) the existence of the Third Party Beneficiary Utility Agreement and/or Sunnyside's Rules and Regulations, constitute actual and/or constructive fraud. See Plaintiff's First Amended Complaint. Printcraft's cause of action for Failure to Disclose and/or Misrepresentation and Printcraft's causes of action for Constructive Fraud must fail for the following reasons: (1) the Defendant had no duty to disclose the information to Printcraft; (2) the facts not disclosed were not material to Printcraft's decision to enter into a month-to-month lease agreement; (3) Printcraft either did not rely on the non-disclosures or had no right to rely on any non-disclosures; and (4) Printcraft's alleged injuries were not the consequent and proximate result of any alleged non-disclosure by the Defendant.

**A. Sunnyside Utilities had no duty to disclose.**

Printcraft's Cause of Action for Failure to Disclose and/or Misrepresentation and its Causes of Action for Constructive Fraud against Sunnyside Utilities must fail because Sunnyside Utilities had no duty to disclose any information to Printcraft. Idaho Courts have stated that:

A party may be under a duty to disclose: (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other party does not know it.

*Sowards v. Rathbun*, 134 Idaho 702, 707, 8 P.3d 1245 (2000).

None of the dealings between this Defendant and the Plaintiff give rise to a duty to disclose. There is no fiduciary or other similar relationship between Printcraft and Sunnyside Utilities. Printcraft never purchased any property from Sunnyside Utilities. See Affidavit of Doyle Beck, para. 3. Printcraft never paid a connection fee to Sunnyside Utilities for sewer service. See Affidavit of Doyle Beck, para. 4. Printcraft did not acquire J&LB Properties' rights to use Sunnyside Utilities' sewer services. See Statement of Facts, para. 24 and 26. Even if there was a contractual relationship between Sunnyside Utilities and Printcraft prior to September 26, 2006, Sunnyside would have no duty to disclose. In *Mitchell v. Barendregt*, a party asserted that a relationship of trust and confidence existed (with the accompanying duty to disclose) because: "(1) Mitchell trusted Barendregt, and (2) as parties to a contract, Mitchell and Barendregt were obliged to act in good faith toward one another." 120 Idaho 837, 844 (Ida. App. 1991). The Court refused to find a relationship of trust and confidence under such circumstances and stated: "The law of contracts is clear that neither of these facts is sufficient to establish a



relationship of trust and confidence from which the law will impose fiduciary obligations between Mitchell and Barendregt.” *Id.* The Court held that “[b]ecause no legally enforceable relationship of trust and confidence existed between Mitchell and Barendregt, **no action for constructive fraud** can arise from their dealings.” *Id.* (Emphasis added). The types of relationships that will give rise to a relationship of trust and confidence are: members of the same family, partners, attorney and client, executor and beneficiary of an estate, principal and agent, insurer and insured, or close friends. *Id.*

Sunnyside Utilities was never informed of the types or quantities of substances that were going to be discharged by Printcraft. See Deposition of Printcraft Press, pg. 119, 10-17 and pg. 165, ln. 25 through pg. 166, ln. 3. When asked what Printcraft had stated to Sunnyside Utilities regarding its discharges Printcraft responded: “**Nothing.**” See Deposition of Printcraft Press, pg. 119, ln. 15-17. Sunnyside Utilities never promised any type of sewer services to Printcraft, prior to Printcraft’s occupancy of the building. See Deposition of Printcraft Press, pg. 109, ln. 15 through pg. 110, ln. 2.

Under these facts, no jury could reasonably find that Sunnyside Utilities had a duty to disclose to Printcraft. Sunnyside Utilities is entitled to Summary Judgment on Printcraft’s Cause of Action for Non-disclosure and Printcraft’s two Causes of Action for Constructive Fraud because of the lack of any duty to disclose.

**B. Any alleged non-disclosure by the Defendant was not material.**

Sunnyside Utilities is entitled to Summary Judgment because any alleged non-disclosure by Sunnyside Utilities was not material to Printcraft’s decision to enter into an oral, month-to-month sub-lease with CTR Management.

“As to a claim of fraud, ‘[m]ateriality refers to the importance of the misrepresentation in determining **the plaintiff’s course of action.**’” *Aspiazu v. Mortimer*, 139 Idaho 548, 82 P.3d 830 (2003) (quoting *Watts v. Krebs*, 131 Idaho 616, 619, 962 P.2d 387, 390 (1998) (Emphasis added). Printcraft’s First Amended Complaint claims that:

The failure of Defendants to disclose the prohibitions to the Plaintiff and/or the Plaintiff’s predecessor occupants and owners was material in that the Plaintiff and/or the Plaintiff’s predecessor occupants and owners were never given the opportunity to ascertain whether they would voluntarily continue to go through with the transaction to either create, own, or occupy the premises to which the prohibited sewer connection existed.

First Amended Complaint, para. 82 (C). See also First Amended Complaint, para. 87-89 and 101. Based on Printcraft’s allegations and applicable case law, the Court must analyze the importance of the alleged failure to disclose by the defendants, on Printcraft’s decision to enter into an oral month-to-month sub-lease with CTR Management. The oral, month-to-month sub-lease agreement is Printcraft’s sole connection to property.

Printcraft, by the terms of its lease and the lease between CTR Management and J&LB Properties, was specifically informed that no utilities, including sewer service were included in the lease of the building. See Lease Agreement, attached as Exhibit “J” to Plaintiff’s Amended Complaint. Whether or not Sunnyside could legally provide sewer services to the owner of the building (ie-the lessor) would not be important to Printcraft’s decision to enter into the lease, where Printcraft, as sub-lessee, was not given any right to sewer service as a provision of the sub-lease. Claiming that Printcraft would not have occupied the building if they would have known about the alleged system limitations on Sunnyside Utilities’ sewer system, is merely an attempt to create an issue of fact where

none exists. Printcraft was not promised sewer services when they entered into the sub-lease agreement, so the type and capacity of any sewer services would be immaterial to Printcraft's decision to enter into the oral month-to-month sub-lease agreement. Printcraft was promised nothing and has no claim, even if that were all Printcraft received.

Because the alleged non-disclosures were not material to Printcraft's decision to lease the building, Sunnyside Utilities is entitled to Summary Judgment on Printcraft's cause of action for Failure to Disclose and/or Misrepresentation and Printcraft's two causes of action for Constructive Fraud.

### **C. Printcraft did not rely on any alleged misrepresentation**

Defendant is entitled to Summary Judgment because Printcraft did not rely on the nondisclosure. "One of the elements that must be proven in order to establish fraud is justifiable reliance upon a false statement or representation." *Watson v. Weick*, 141 Idaho 500, 507, 112 P.3d 788 (2005). Printcraft has asserted that the reliance on the non-disclosure was as follows:

That in fact the Plaintiff and all the Plaintiff's predecessor occupants and owners relied upon the nondisclosures made by the Defendants in that they actually took action to **purchase property, construct a building and obtain a sewer connection** that was at the time specifically prohibited by District Seven Health Department.

See First Amended Complaint, para. 82 (G) (Emphasis added). Printcraft's allegations with regard to reliance on the alleged nondisclosures of the size of the sewer system and the Third Party Agreement and Rules and Regulations are similar. *Id.* para. 86(G) and 101(G). Printcraft did not purchase the property, it merely occupies the property as a month-to-month sublessee. *Id.*, para. 26. Printcraft did not construct the building or obtain

the sewer connection as such actions were completed by the owners of the building. *Id.*, para. 24 and 25. Printcraft simply did not do **anything** in reliance on the alleged non-disclosures.

Because Printcraft did not rely on any alleged non-disclosure or misrepresentation and was not entitled to rely on such, Sunnyside Utilities is entitled to Summary Judgment on Printcraft's claim for Failure to Disclose and/or Misrepresentation and Printcraft's claims for Constructive Fraud.

#### **D. Printcraft has not suffered any damages**

Printcraft's cause of action for Failure to Disclose and/or Misrepresentation and Printcraft's causes of action for Constructive Fraud must fail because Printcraft has not suffered any damages as a direct and proximate result of any alleged failure to disclose or any alleged misrepresentation. In order to sustain its Cause of Action for Failure to Disclose and/or Misrepresentation, Printcraft must show that this defendant's failures to disclose (1) that the septic permit issued by District Seven Health Department allegedly only provided for one or two buildings or (2) District Seven Health Department's letter, which allegedly prohibits connection of any additional buildings were the direct and proximate cause of Printcraft's damages. In order to sustain its two Causes of Action for Constructive Fraud, Printcraft must show that its damages were the direct and consequent result of (1) the non-disclosure of the size of the sewer system and the systems limitations and (2) the non-disclosure of the Third Party Beneficiary Utility Agreement and Sunnyside Utilities' Rules and Regulations.

In June of 2006, despite the alleged prohibitions, there were 10 to 11 sewer

connections to Sunnyside Utilities' sewer system, including the building occupied by the Printcraft. See First Amended Complaint, para. 10. Printcraft received the sewer connection that Printcraft claims it was entitled to receive, and utilized that connection, until Printcraft forfeited those services by its persistent violations.

The reason Printcraft is not still connected to the sewer system is because of Printcraft's persistent violations of the Rules and Regulations, Printcraft's violations of applicable state and federal regulations with regards to its sewer discharges, and Printcraft's refusal to prevent "processed wastes" from entering the sewer system, even after specifically agreeing in September of 2006 not to discharge such wastes. See Memorandum in Support of Defendant's Second Motion for Summary Judgment. See *also* Order RE: Pending Motions entered July 3, 2007 pg. 1. The alleged non-disclosed information was not the cause of any of Printcraft's damages, and therefore, any failure of this defendant to disclose such information cannot sustain a cause of action for fraud. Defendant Sunnyside Utilities is entitled to Summary Judgment on Plaintiff's cause of action for Failure to Disclose and/or Misrepresentation and Plaintiff's causes of action for Constructive Fraud because Plaintiff has not suffered any damages as a direct and proximate result of any alleged non-disclosure by Sunnyside Utilities.

### **CONCLUSION**

Printcraft Press is not entitled to collect damages for any breach of the Third Party Beneficiary Utility Agreement because (1) there is no issue of material fact that Printcraft breached the terms of the agreement and that Sunnyside Utilities was justified in disconnecting Printcraft from sewer services; and (2) Printcraft is at most an incidental

beneficiary of the agreement. Therefore, Sunnyside Utilities is entitled to Summary Judgment on Printcraft's cause of action for Breach of the Third Party Utility Agreement.

Printcraft Press is not entitled to recovery for its causes of action for non-disclosure and/or misrepresentation or constructive fraud because (1) Sunnyside Utilities had no duty to disclose the information to Printcraft; (2) the information that was allegedly withheld was not material to Printcraft's decision to enter into a sub-lease to occupy building; (3) Printcraft did not rely upon or was not entitled to rely upon the alleged non-disclosure of information; and (4) Printcraft's alleged damages are not the direct and proximate result of the non-disclosure of information.

DATED this 19 day of July, 2007.



---

Mark R. Fuller  
Fuller & Carr

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of July, 2007:

Document Served:

DEFENDANT SUNNYSIDE INDUSTRIAL  
AND PROFESSIONAL PARK'S MOTION  
FOR SUMMARY JUDGMENT

Attorney Served:

Lane Erickson, Esq.  
Patrick N. George, Esq.  
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FULLER & CARR

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FALLS  
CLERK OF DISTRICT COURT

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK UTILITIES, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINTCRAFT PRESS, INC., an Idaho )  
corporation, )

Plaintiff, )

v. )

SUNNYSIDE UTILITIES, INC., an Idaho )  
corporation, SUNNYSIDE PARK )  
OWNERS ASSOCIATION, INC., an )  
Idaho corporation, and SUNNYSIDE )  
INDUSTRIAL AND PROFESSIONAL )  
PARK, LLC, an Idaho limited liability )  
corporation, )

Defendants. )

Case No. CV-06-7097

**AFFIDAVIT OF DOYLE BECK**

STATE OF IDAHO )  
County of Bonneville ) ss.

Doyle Beck, being first duly sworn upon his oath states and  
alleges as follows:

1. Affiant is a resident of Bonneville County, State of  
Idaho and executes this Affidavit upon his personal knowledge.

2. Affiant is an officer of Sunnyside Park Utilities, Inc.

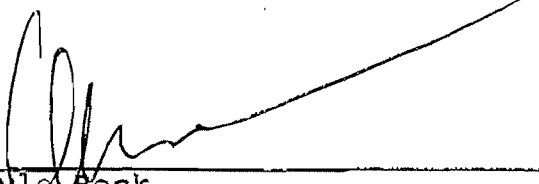


3. Printcraft Press has never purchased any property from Sunnyside Park Utilities, Inc.

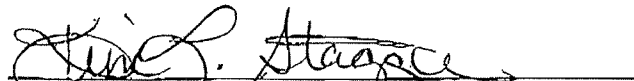
4. Printcraft Press has never paid any connection fee for the sewer services provided by Sunnyside Park Utilities, Inc.

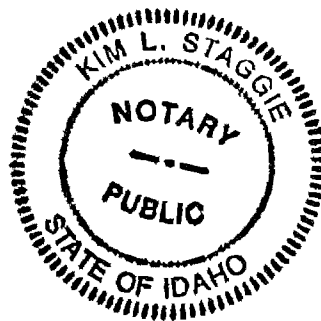
5. Further this Affiant sayeth naught.

DATED this 19<sup>th</sup> day of July, 2007.

  
\_\_\_\_\_  
Doyle Beck  
Sunnyside Park Utilities

SUBSCRIBED AND SWORN to before me this 19<sup>th</sup> day of July, 2007.

  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Idaho Falls  
My Commission Expires: 5/02/12



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this 19 day of July, 2007:

Document Served:

AFFIDAVIT OF DOYLE BECK

Attorneys Served:

Lane Erickson, Esq.  
Mitchell Brown, Esq.  
RACINE OLSEN NYE  
P.O. Box 1391  
Pocatello, ID 83204

<u>      </u>	U.S. Mail
<u>  X  </u>	Facsimile
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Mark R. Fuller  
Mark R. Fuller  
FULLER & CARR

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CLERK OF DISTRICT COURT  
SEVENTH JUDICIAL DISTRICT  
IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK UTILITIES, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation, )	
Plaintiff, )	
v. )	<b>NOTICE OF FILING EXCERPTS OF</b>
SUNNYSIDE UTILITIES, INC., an Idaho )	<b>DEPOSITION</b>
corporation, SUNNYSIDE PARK )	
OWNERS ASSOCIATION, INC., an )	
Idaho corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation, )	
Defendants. )	
_____ )	

COMES NOW the defendant, Sunnyside Park Utilities, Inc., by and through his attorney of record, Mark R. Fuller, of Fuller and Carr, and deposits with the above-entitled Court the following attached documents:

1. Excerpts of the Printcraft Press Deposition taken April 25, 2007, pgs. 109-110, 119, 165-166.

These Excerpts are submitted in support of Defendant's Motion For Summary Judgment.

DATED this 19 day of July, 2007.



Mark R. Fuller  
Fuller & Carr

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of ~~March~~ <sup>July</sup>, 2007:

Document Served:

NOTICE OF FILING EXCERPTS OF  
DEPOSITION

Attorney Served:

Mitchell W. Brown, Esq.  
Lane Erickson, Esq.  
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       Facsimile  
 5  Hand Delivery



Mark R. Fuller  
FULLER & CARR

Transcript of the Testimony of:  
**Travis Waters**

**Date:** April 25, 2007  
**Volume:** I

**Case:** PRINTCRAFT PRESS, INC. v. SUNNYSIDE  
UTILITIES, INC.

**Printed On:** 7/19/2007

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1 was provided by you. Is this a copy of the canceled  
 2 check that you were referring to?  
 3 A. No.  
 4 Q. Do you know what this is?  
 5 A. I don't. It looks like a statement out  
 6 of Quickbooks or something.  
 7 MR. ERICKSON: For the record, Mark, I think  
 8 we actually provided you a copy of the check along  
 9 with these documents is my recollection. I'm  
 10 certainly willing to go back and take a look again at  
 11 what we produced. My recollection was seeing it and  
 12 providing it in connection with these documents.  
 13 MR. FULLER: We'll check again. I think  
 14 this is the only one we've been able to locate. It  
 15 actually has what I think is the check number written  
 16 up here in the corner.  
 17 MR. ERICKSON: What you'll find unusual is  
 18 it wasn't printed by a computer. It says Sunnyside  
 19 Utilities, Incorporated in handwriting. That's  
 20 probably what you'll need to look for. I'll go back  
 21 and double-check on that as well.  
 22 Q. BY MR. FULLER: All I'm trying to  
 23 establish is that Printcraft Press itself paid  
 24 nothing for the cost of connection; isn't that  
 25 correct?

1 A. Correct. I have a copy of that check.  
 2 I'm sure I could find it if you want.  
 3 Q. If you wouldn't mind, that would be  
 4 great.  
 5 MR. ERICKSON: I'll double-check, too, Mark.  
 6 I kept a complete copy of everything that I sent to  
 7 you.  
 8 MR. FULLER: Let's stop for just a minute.  
 9 (A break was taken from 12:02 p.m. to  
 10 12:03 p.m.)  
 11 Q. BY MR. FULLER: We've gone off the  
 12 record for just a minute, Mr. Waters. You provided  
 13 me with a copy of check number 5896, which is now  
 14 page 3 of Exhibit \*-009; is that correct?  
 15 A. Correct.  
 16 MR. FULLER: By stipulation of counsel,  
 17 we've agreed to just attach that as an additional  
 18 page of Exhibit \*-009; is that correct, Counsel?  
 19 MR. ERICKSON: That is correct.  
 20 Q. BY MR. FULLER: Just to finalize this,  
 21 am I correct that the connection fees were paid by  
 22 CTR Development, LLC, and that Printcraft Press paid  
 23 no portion of the connection fee?  
 24 A. That's correct.  
 25 Q. Why did CTR Development pay the fee?

1 A. They were the owner of the building.  
 2 Q. Did CTR Development know what kind of  
 3 sewer service Printcraft Press would need when it  
 4 subleased the property to Printcraft?  
 5 A. Yes.  
 6 Q. Can you explain for me what was  
 7 discussed between Printcraft and CTR Development  
 8 about the needs of Printcraft at the time that  
 9 sublease was agreed to?  
 10 A. That they'd need four bathrooms, a drain  
 11 for the Roland 305, a water heater, a break room with  
 12 a sink in it, and a wash-up area for the flexo area.  
 13 Q. Was there any discussion about the kind  
 14 of chemicals that would be discharged by Printcraft  
 15 with its processed waste?  
 16 A. There was no need for a discussion,  
 17 because there was nothing of any alarm.  
 18 Q. It wasn't discussed?  
 19 A. Huh-uh.  
 20 Q. Who would be the participants in this  
 21 conversation on behalf of Printcraft?  
 22 A. Travis Waters.  
 23 Q. Who would be the participant in that  
 24 conversation on behalf of CTR Development?  
 25 A. Lawry Wilde.

1 Q. Do you recall a specific conversation  
 2 regarding the needs?  
 3 A. No. There was hours and hours and hours  
 4 of conversations and details concerning the building.  
 5 Q. Did CTR Development make any promises to  
 6 Printcraft regarding the type of sewer services that  
 7 would be available?  
 8 A. No. There was an assumption that there  
 9 was sewer and water.  
 10 Q. On what was that assumption based?  
 11 A. That that subdivision had sewer and  
 12 water.  
 13 Q. Anything else?  
 14 A. No.  
 15 Q. Was there any investigation made by  
 16 Printcraft Press regarding the services provided by  
 17 Sunnyside Park Utilities before construction of the  
 18 building began?  
 19 A. No.  
 20 Q. Was there any investigation made by  
 21 Printcraft Press regarding the services provided by  
 22 Sunnyside Park Utilities before Printcraft began  
 23 occupancy?  
 24 A. No.  
 25 Q. Did Sunnyside promise anything to

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1 Printcraft before Printcraft began occupancy?  
 2 A. No.  
 3 Q. Did Sunnyside promise anything to CTR?  
 4 A. Yes.  
 5 Q. What?  
 6 A. Sewer and water service.  
 7 Q. To whom were those promises made at CTR  
 8 Development?  
 9 A. I'd say Travis Waters and Lawry Wilde.  
 10 Q. By whom were those promises made by  
 11 Sunnyside?  
 12 A. I would say it's through a document  
 13 that's filed at Bonneville County that says that  
 14 Sunnyside will provide sewer and water.  
 15 Q. Which document are you referring to?  
 16 A. I think it's the development agreement,  
 17 the plat has that on there. I think there's multiple  
 18 documents, actually, that have the commitment between  
 19 Sunnyside Utilities, Sunnyside Industrial Park and  
 20 Bonneville County and District Seven.  
 21 Q. My question was, what promises were made  
 22 by Sunnyside Utilities to CTR. You had indicated  
 23 that CTR was promised sewer and water and that those  
 24 promises were made to Travis and Lawry.  
 25 My next question was, who at Sunnyside

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1 made those promises? Can you identify any verbal  
 2 statements, or are you relying only upon the written  
 3 documents you've referred to?  
 4 A. I don't recall any verbal.  
 5 Q. We're just talking about the written  
 6 documents?  
 7 A. Correct.  
 8 Q. Was there any direct correspondence,  
 9 letters, between Sunnyside Utilities and CTR  
 10 promising specific services?  
 11 A. I don't know, not that I know of.  
 12 Q. Okay. So we're talking about the  
 13 development agreement, the plat. What other  
 14 documents did CTR rely upon regarding sewer and water  
 15 services?  
 16 A. The CCNRs, the development agreement,  
 17 the plat, anything that we would have gotten at  
 18 closing.  
 19 Q. Did Sunnyside participate in preparing  
 20 any of those closing documents?  
 21 A. Yeah. It's got your name on a lot of  
 22 those documents.  
 23 Q. This is the documents by which the  
 24 property was acquired from Miskin, right?  
 25 A. Correct.

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1 Q. Those are the closing documents you're  
 2 referring to?  
 3 A. Right. And you prepared some of those  
 4 documents and then filed them with the county. Then  
 5 the title company requested a copy of those filed  
 6 documents and provided them to us.  
 7 Q. Did you keep a copy of your closing  
 8 documents, your closing file?  
 9 A. Yes. I'm sure I've got that.  
 10 Q. Do you have those?  
 11 A. No.  
 12 Q. Would you have those available to bring  
 13 back with you after lunch?  
 14 A. No.  
 15 Q. They are available to produce to your  
 16 attorney?  
 17 A. Yes.  
 18 Q. Who was the closing title office?  
 19 A. I don't recall.  
 20 MR. FULLER: I think that's a good place for  
 21 us to stop at lunch. Why don't we start back up  
 22 again at 1:15.  
 23 (A break was taken from 12:11 p.m. to  
 24 1:33 p.m.)  
 25 Q. BY MR. FULLER: We're back on the record

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1 after a lunch break. You understand, Mr. Waters,  
 2 that you're still under oath?  
 3 A. Yes.  
 4 Q. I want to ask you for just a minute  
 5 about a document we had already discussed this  
 6 morning. I'm handing you what's been marked  
 7 Exhibit \*-007. Is this the document that you  
 8 actually dropped off to Mr. Beck? You indicated  
 9 there was also a fourth page to it?  
 10 A. I dropped off full size blueprints in a  
 11 roll, not an 8 1/2-by-11 representation of that.  
 12 Q. How large would they have been?  
 13 A. 24-by-36.  
 14 Q. This size?  
 15 A. I dropped those off as well.  
 16 Q. You're saying they were bigger than  
 17 this?  
 18 A. Yeah. There should have been a set that  
 19 was bigger than that that had the site plan with it  
 20 from Mountain River Engineering and a full, just like  
 21 I gave to the county that would reside on the  
 22 premises during construction.  
 23 Q. Can you turn to the second page of  
 24 Exhibit \*-007 for me? There's some handwriting on  
 25 the lower left; is that your handwriting?

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1 Q. This document was dropped off to  
2 Mr. Beck after you had a visit with him; is that  
3 correct?

4 A. No. I think we visited at the time I  
5 dropped it off.

6 Q. Why were these items written on this  
7 document if it was given to him during a meeting with  
8 him?

9 A. So that I wouldn't forget to address  
10 them.

11 Q. You wrote these on in advance of the  
12 meeting?

13 A. I believe so.

14 Q. Then discussed them with him at the  
15 meeting?

16 A. Right.

17 Q. If I understand your testimony, in both  
18 cases he said he would get back to you but did not?

19 A. With the railroad easement, he was going  
20 to get me that. With the phone line, I don't  
21 remember if he at that point said, that's your  
22 responsibility, and I just left it at that, or he got  
23 back with me later, I don't recall.

24 Q. Did Printcraft inform Sunnyside about  
25 the types and quantity of waste Printcraft intended

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1 to discharge into Sunnyside's septic system?

2 A. I need you to say Sunnyside Utilities or  
3 Sunnyside Industrial Park so we both know who you're  
4 talking about.

5 Q. Unless I specify otherwise, my questions  
6 concern Sunnyside Utilities. I will identify if I  
7 mean anything other than that entity; are you  
8 comfortable with that?

9 A. I am.

10 Q. Let me restate the question. Did  
11 Printcraft inform Sunnyside about the types and  
12 quantities of waste Printcraft intended to discharge  
13 into Sunnyside's septic system?

14 A. No.

15 Q. What was Sunnyside told by Printcraft,  
16 if anything, would be discharged?

17 A. Nothing.

18 Q. You have been asked to bring documents  
19 that specifically identify all chemicals and other  
20 substances discharged into Sunnyside's sewer system  
21 by Printcraft. You asked to delay that until the  
22 beginning of the afternoon to gather those documents.  
23 Do you have documents in compliance with that  
24 request?

25 A. I do.

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1 MR. ERICKSON: Let me tell you how we  
2 organized these, too, so it may help you in aid of  
3 your questions. What we did is, we prepared these  
4 documents by system, like, the flexo system or the  
5 litho system, some of which would be discharged, some  
6 of which would not be discharged. We wanted to keep  
7 it all together so you could go through that way and  
8 talk about one complete system and be done with it.

9 What I'm hoping Travis was able to do  
10 is, he'll identify for you what would have been  
11 discharged and what would not have been discharged.  
12 In other words, for the litho process, some of the  
13 chemicals did go into the sewer, some of them did  
14 not. But all the MSDS sheets for that process are  
15 included behind that tab. Does that make sense?

16 MR. FULLER: I'm afraid it doesn't. Try  
17 once more.

18 MR. ERICKSON: In order to use the litho  
19 system, there are a number of chemicals that are used  
20 in that process. Travis talked earlier today about  
21 some that are used with the water and would have been  
22 discharged with the water. Some of those chemicals  
23 are not discharged into the sewer system, but they're  
24 still used in the process.

25 MR. FULLER: They're consumed in the

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1 process?

2 MR. ERICKSON: I'm not sure if they're  
3 consumed or recirculated or collected and disposed  
4 of, but Travis can answer all those questions for  
5 you. In your subpoena you listed two specific issues  
6 for MSDS, those that would have been discharged and  
7 those that would have been used that were disposed of  
8 a different way.

9 MR. FULLER: That's correct.

10 MR. ERICKSON: What we did is simply provide  
11 you a list of all chemicals for each specific  
12 process, that's how we categorized them, and Travis  
13 will be able to identify for you which of those would  
14 have been discharged and which of those would have  
15 not been discharged.

16 MR. FULLER: The binder you have given me,  
17 these are my copies?

18 THE WITNESS: That's my only copy.

19 MR. ERICKSON: You'll see where the sticky  
20 notes are, those are the tabs and the categories that  
21 have been prepared for each of those processes.

22 MR. FULLER: Why don't I have him explain  
23 the process. As I indicated to you, I have a brief  
24 hearing that will only take 15 minutes at 3:00. That  
25 will be a good time to take a break, and then my





1 remember ever telling the City of Idaho Falls, our  
2 own septic system, or anything, or Sunnyside what was  
3 going down the drain.

4 Q. We're now to the bindery materials. Can  
5 you identify for me what that first chemical is?

6 A. It's a Har Adhesive. It's a padding  
7 compound that's an adhesive, it's like Elmer's Glue.  
8 This is the same thing. It's a fan apart padding  
9 adhesive.

10 Q. Are either of these materials allowed to  
11 flow in the sewer system?

12 A. No.

13 Q. These are just used in the process of  
14 binding?

15 A. We buy them by the quart, it's pretty  
16 minor.

17 Q. Then you have a section on cleaning  
18 materials. These appear to be standard hand  
19 cleaners, dishwashing detergent; am I correct? All  
20 purpose cleaners, are these allowed to flow into the  
21 sewer system?

22 A. In our process right now?

23 Q. Yeah.

24 A. Yeah. But it also says to dispose of in  
25 accordance with all applicable federal, state, and

1 local laws.

2 Q. Did you make any determination as to how  
3 those state, federal, or local laws might be  
4 applicable to the disposal of your cleaning  
5 materials?

6 A. No.

7 Q. Pine Sol, these are all just basic  
8 cleaning materials, correct? Are these used in the  
9 printing process, or are these just used in your  
10 normal cleaning processes?

11 A. Well, naturally your hands get dirty.  
12 So this Gojo is a pumice hand cleaner. It's a pretty  
13 aggressive hand cleaner. It's not like we would have  
14 this in the office for the secretaries to use. I  
15 would say it's part of the printing process because  
16 of the nature of the printing process.

17 Q. When I look at the photographs contained  
18 in Exhibit \*-003 on page 2, pictures A and B show a  
19 number of cleaning products located beneath this same  
20 drain, this sink. Are these the cleaning products  
21 that are referred to in these?

22 A. This is a Castrol Super Cleaner, which  
23 is a comparable product to the 409. We don't have an  
24 MSDS sheet in here for the SOS pads, but I can get  
25 that.

1 Q. Are these chemicals used in this sink  
2 which drains directly into the sewer system?

3 A. We'll use the 409 degreaser or something  
4 like this Castrol Super Clean degreaser throughout  
5 the building. We use it to scrub floors, scrub  
6 counter tops, bathrooms, press parts.

7 Q. I can see stuff here called Kim Kare.  
8 Do you know what that is?

9 A. I don't.

10 Q. I presume, do you suspend these in water  
11 and use them for cleaning purposes?

12 A. Correct.

13 Q. After you use it, how do you dispose of  
14 the water, pour it down the drain?

15 A. Yeah.

16 Q. If I understand your testimony,  
17 Printcraft feels it has no duty to inform Sunnyside  
18 of any of the chemicals that it discharged into its  
19 system?

20 A. As of right now?

21 Q. Prior to disconnection.

22 A. Correct.

23 Q. You didn't have any obligation?

24 A. Correct.

25 MR. FULLER: With your approval, this would

1 be a good time to break. I really think this is  
2 going to be a 10 minute hearing, and I'll be right  
3 back.

4 MR. ERICKSON: That will be just fine.

5 MR. FULLER: I'll give this binder to my  
6 secretary and have her see if during the time we're  
7 gone she can make at least one copy. I better have  
8 two so that I'll have one and one to give to the  
9 court reporter.

10 MR. ERICKSON: That would be fine.

11 MR. FULLER: We will begin again as quickly  
12 as I can return, hopefully within 30 minutes. I do  
13 expect to be done this evening.

14 (A break was taken from 2:54 p.m. to  
15 4:31 p.m.)

16 (Exhibit \*-010 marked.)

17 Q. BY MR. FULLER: For the record, we have  
18 attached a copy as Exhibit \*-010 of all of the MSDS  
19 documents that you brought that we've already  
20 reviewed on the record today; is that correct,  
21 Mr. Waters?

22 A. Correct.

23 MR. FULLER: Do you have any objection to  
24 that being marked as an exhibit to the deposition,  
25 Counsel?

MARK R. FULLER (ISB No. 2698)  
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2007 JUL 19 10 24 53

CLERK OF DISTRICT COURT  
IDAHO FALLS, IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK UTILITIES

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation, )	
)	
Plaintiff, )	<b>SUNNYSIDE PARK UTILITIES, INC.'S</b>
)	<b>MOTION FOR SUMMARY JUDGMENT</b>
v. )	
)	
SUNNYSIDE UTILITIES, INC., an Idaho )	
corporation, )	
SUNNYSIDE PARK )	
OWNERS ASSOCIATION, INC., an )	
Idaho corporation, and )	
SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation, )	
)	
Defendants. )	
)	

COMES NOW, the Defendant, Sunnyside Park Utilities, Inc. an Idaho Corporation ("Sunnyside Utilities"), through its counsel of record, Mark R. Fuller of Fuller & Carr, and moves the Court pursuant to IRCP 56(b) for Summary Judgment on all of Plaintiff's Causes of Action.

Sunnyside Utilities is entitled to Summary Judgment on Printcraft's Cause of Action for Breach of Contract because:

DEFENDANT SUNNYSIDE PARK UTILITIES'  
MOTION FOR SUMMARY JUDGMENT - 1

(1) Printcraft Press, Inc. (hereafter "Printcraft") materially breached the Rules and Regulations for sewer service and violated State and Federal law, therefore any disconnection of the sewer services to Printcraft was justified and was not a Breach of Contract; and

(2) Printcraft is merely an incidental beneficiary under the Third Party Utility Agreement and has no rights to maintain an action for Breach of Contract.

Sunnyside Utilities is entitled to Summary Judgment on Printcraft's Cause of Action for Failure to Disclose and/or Misrepresentation and Printcraft's Two Causes of Action for Constructive Fraud because:

(1) Sunnyside Utilities had no duty to disclose;

(2) Any alleged non-disclosures were not material to Printcraft's decision to enter into an oral, month-to-month sub-lease agreement with CTR Management, LLC;

(3) Printcraft did not rely on any alleged non-disclosures; and

(4) Printcraft's alleged damages were not caused by any alleged non-disclosures.

The Motion is based upon this Motion, the Notice of Hearing, the Brief in Support of Sunnyside Park Utilities' Motion for Summary Judgment, the Discovery Responses filed with the Court, and the Affidavit of Doyle Beck dated July 19, 2007, filed herewith.

DATED this 19 day of July, 2007.



Mark R. Fuller  
Fuller & Carr

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of July, 2007:

Document Served:

DEFENDANT SUNNYSIDE PARK  
UTILITIES' MOTION FOR SUMMARY  
JUDGMENT

Attorney Served:

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Patrick N. George, Esq.  
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Mark R. Fuller  
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2007 JUL 19 11:05:53  
CLERK OF DISTRICT COURT  
IDAHO FALLS, IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK OWNERS ASSOCIATION, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINTCRAFT PRESS, INC., an Idaho )	<b>Case No. CV-06-7097</b>
corporation, )	
Plaintiff, )	<b>BRIEF IN SUPPORT OF DEFENDANT</b>
v. )	<b>SUNNYSIDE PARK OWNERS</b>
)	<b>ASSOCIATION'S MOTION FOR</b>
)	<b>SUMMARY JUDGMENT</b>
SUNNYSIDE UTILITIES, INC., an Idaho )	
corporation, )	
SUNNYSIDE PARK )	
OWNERS ASSOCIATION, INC., an )	
Idaho corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited liability )	
corporation, )	
Defendants. )	
_____ )	

COMES NOW, the Defendant, Sunnyside Park Owners Association, an Idaho corporation ("SPOA"), through its counsel of record, Mark R. Fuller of Fuller & Carr, and submits this Brief in Support of Defendant Sunnyside Park Owners Association's Motion for Summary Judgment.

**STATEMENT OF UNDISPUTED FACTS**

1. Neither Printcraft Press, Inc. (hereafter "Printcraft"), nor any of the past or present

DEFENDANT SUNNYSIDE PARK OWNERS ASSOCIATION, INC.'S  
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1

owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park are members of SPOA. See Affidavit of Kirk Woolf, para. 3.

2. Neither Printcraft, nor any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park have ever paid any type of consideration to SPOA. See Affidavit of Kirk Woolf, para. 4.
3. SPOA has never promised sewer services to either Printcraft or any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park. See Affidavit of Kirk Woolf, para. 5.
4. SPOA has never provided sewer services to either Printcraft or any of the past or present owners of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park. See Affidavit of Kirk Woolf, para. 6.
5. Defendant SPOA incorporates by reference and re-alleges the Statement of Facts set forth by Sunnyside Park Utilities, Inc. (hereafter "Sunnyside Utilities") in Sunnyside Utilities' Brief in Support of Motion for Summary Judgment, as if set forth fully herein.

#### **STANDARD ON MOTION FOR SUMMARY JUDGMENT**

Defendant SPOA incorporates by reference and re-alleges the Standard on Motion for Summary Judgment set forth by Sunnyside Park Utilities, Inc., in its Brief in Support of Motion for Summary Judgment, as if set forth fully herein.

#### **ARGUMENT**

##### **I. BREACH OF THIRD PARTY UTILITY AGREEMENT**

##### **A. Defendant SPOA has no obligations to provide sewer services to**

### **Printcraft under the Third Party Beneficiary Utility Agreement.**

Plaintiff's Cause of Action for Breach of the Third Party Utility Agreement must fail against Defendant SPOA because SPOA has no obligation to provide any sewer services to any of the owners or occupants of Block 1, Lot 5 of the Sunnyside Industrial and Professional Park subdivision. "Pursuant to the terms and conditions of this Third Party Beneficiary Utility Agreement, the Defendant Sunnyside Park Utilities, Inc., is obligated to provide at all times for each building sewage service adequate for safe and sanitary collection and disposal of all sewage." See Plaintiff's First Amended Complaint, para. 19. There is no provision requiring SPOA to provide sewer service. See Third Party Beneficiary Utility Agreement. SPOA has no duty, and has committed no breach.

In Idaho Courts have stated that: "A third party beneficiary in an ordinary contract, is subject to the limitation of its terms as he has no greater rights under it than are provided in the contract itself." *Downing v. Travelers Ins. Co.*, 107 Idaho 511, 525, 691 P.2d 375 (1984). Because SPOA has no obligation to provide any sewer service to the Plaintiff, SPOA is entitled to Summary Judgment on Printcraft's Cause of Action for Breach of the Third Party Beneficiary Utility Agreement.

### **B. Plaintiff is not entitled to enforce the Third Party Utility Agreement because (1) Plaintiff breached the terms of the Agreement applicable to Plaintiff and (2) Plaintiff is merely an incidental beneficiary of the Agreement**

Defendant SPOA re-alleges and incorporates Defendant Sunnyside Utilities' argument regarding the Third Party Beneficiary Utility Agreement contained in Sunnyside Utilities' Memorandum in Support of Motion for Summary Judgment as if set forth fully herein. Because Printcraft breached the terms of the Third Party Beneficiary Agreement



and Printcraft is at most an incidental beneficiary of the Agreement, Defendant SPOA is entitled to Summary Judgment on Printcraft's claim for Breach of Third Party Beneficiary Agreement against this Defendant.

## **II. FAILURE TO DISCLOSE AND/OR MISREPRESENTATION AND CONSTRUCTIVE FRAUD**

SPOA re-alleges and incorporates by reference the argument concerning Failure to Disclose and/or Misrepresentation and Constructive Fraud set forth in Sunnyside Utilities' Brief in Support of Motion for Summary Judgment as if set forth fully herein.

In addition to the facts and argument set forth in Sunnyside Utilities' Briefing, Printcraft's Cause of Action for Failure to Disclose and/or Misrepresentation and Printcraft's two Causes of Action for Constructive Fraud against Defendant SPOA must fail because SPOA had no duty to speak. Printcraft is not a member of SPOA. See Affidavit of Kirk Woolf, para. 3. Printcraft has never paid anything to SPOA. *Id.* para. 4. SPOA has never promised or provided any sewer services to Printcraft. *Id.* para. 5 and 6. There is simply **no relationship whatsoever** between SPOA and Printcraft which could give rise to a duty to disclose.

## **CONCLUSION**

Printcraft Press is not entitled to enforce or collect damages for a breach of the Third Party Beneficiary Utility Agreement against SPOA because (1) SPOA has no obligations to provided sewer services under the Agreement and cannot be in breach; (2) there is no issue of material fact that Printcraft breached the terms of the Agreement ; and (3) Printcraft is at most an incidental beneficiary of the Agreement. Therefore, SPOA is

entitled to Summary Judgment on Printcraft's cause of action for Breach of the Third Party Utility Agreement.

Printcraft Press is not entitled to recovery from SPOA for its causes of action for non-disclosure and/or misrepresentation or constructive fraud because (1) SPOA had no duty to disclose any information to Printcraft; (2) any non-disclosure was not material to Printcraft's decision to enter into an oral month-to-month lease agreement with CTR Management; (3) Printcraft did not rely upon or was not entitled to rely upon the alleged non-disclosure of information; and (3) Printcraft's alleged damages are not the direct and proximate result of the non-disclosure of information. SPOA is entitled to Summary Judgment on all Causes of Action in Printcraft's Amended Complaint.

DATED this 19 day of July, 2007.



Mark R. Fuller  
Fuller & Carr

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 19 day of July, 2007:

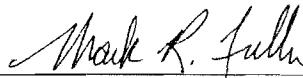
Document Served:

DEFENDANT SUNNYSIDE PARK OWNERS  
ASSOCIATION, INC.'S BRIEF IN SUPPORT  
OF MOTION FOR SUMMARY JUDGMENT

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2007 JUL 19 PM 3:53  
CLERK OF COURT  
DISTRICT COURT  
IDAHO COUNTY

ATTORNEY FOR DEFENDANT SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINCRAFT PRESS, INC., an )	Case No. CV-06-7097
Idaho corporation, )	
)	
Plaintiff, )	SUNNYSIDE INDUSTRIAL AND
)	PROFESSIONAL PARK'S
v. )	ANSWER TO AMENDED COMPLAINT
)	AND DEMAND FOR JURY TRIAL
)	
SUNNYSIDE PARK UTILITIES, )	
INC., an Idaho corporation, )	
SUNNYSIDE PARK OWNERS )	
ASSOCIATION, INC., an Idaho )	
corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited )	
liability corporation. )	
)	
Defendants. )	
)	
)	
)	

COMES NOW the Defendant, Sunnyside Industrial and Professional Park, LLC., an Idaho limited liability company (hereafter "SIPP"), and in response to the Amended Complaint filed by Plaintiff, states and alleges as follows:

1. Defendant denies each and every allegation set forth in the Amended Complaint except as expressly admitted herein.
2. Plaintiff's Complaint fails to state a cause of action

SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK'S ANSWER  
TO AMENDED COMPLAINT, AND DEMAND FOR JURY TRIAL - 1

upon which relief can be granted.

3. In response to paragraph 1, defendant denies that this is an action arising out of certain disclosures the defendant failed to make. Defendant asserts that this is an action arising out of the disconnection of Printcraft Press's sewer connection to Sunnyside Park Utilities, Inc. (hereafter "Sunnyside Utilities"). The defendant admits that there is a sewer system located in the Sunnyside Industrial and Professional Park subdivision which is operated and maintained by Sunnyside Utilities.

4. In answer to paragraphs 2, 3, 4, and 5, defendant admits the same.

5. In answer to paragraphs 6 and 7 defendant admits the same.

6. In answer to paragraph 8, defendant admits that it completed and filed with District Seven Health Department a septic permit for the installation of a septic system that would service a minimum of one to two buildings. Defendant admits that a copy of District Seven Health Department's septic permit is attached as Exhibit "A" to the Plaintiff's First Amended Complaint.

7. In answer to paragraph 9, defendant admits the same.

8. In answer to paragraph 10, defendant admits the same.

9. In answer to paragraph 11, defendant admits that on August 4, 1999, this Defendant and Bonneville County entered into a Development Agreement. The defendant denies that it promised to provide all street improvements and utilities as were necessary to be completed. The agreement specifically states that the "owner(s)" will construct said needed utility or street

improvements. The agreement does not obligate the "Developer" to construct needed utility or street improvements.

10. In answer to paragraph 12, defendant admits the same.

11. In answer to paragraph 13, defendant denies the same.

12. In answer to paragraph 14, defendant admits the same.

13. In answer to paragraph 15, defendant admits that a meeting was held. However, defendant denies the remainder of the allegations contained in paragraph 15.

14. In answer to paragraph 16, defendant admits the same.

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16. In answer to paragraph 18, defendant denies that Sunnyside Utilities entered into an agreement with the Defendant Sunnyside Park Owners Association, Inc. (hereafter "SPOA") for the providing of water and sewer services to the subdivision identified in the plat map. Defendant asserts that Sunnyside Utilities entered into an agreement with SPOA, to provide sewer services to past, present, and future owners and occupants of any subdivisions which were being or might one day be served by Sunnyside Utilities' sewer facilities.

17. In answer to paragraph 19, defendant admits the same.

18. In answer to paragraph 20, defendant admits that the Third Party Beneficiary Agreement states: "This Agreement shall

also be binding upon and shall inure to the benefit of...all present and future owners or occupants." Defendant denies the remainder of paragraph 20.

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20. In answer to paragraph 22, Defendant denies that the Agreement is only binding on Plaintiff if the Agreement was recorded. Defendant specifically denies that the Agreement contains specific language in several places indicating that the Third Party Beneficiary Agreement would be recorded "so as to put all persons on notice that any properties receiving sewer services would be subject to the terms of the Agreement." Defendant admits that a true and correct copy of the Third Party Beneficiary Utility Agreement is attached as Exhibit "G" to plaintiff's Complaint.

21. In answer to paragraph 23, defendant admits the same.

22. In answer to paragraph 24, defendant admits the same.

23. In answer to paragraph 25, defendant admits that on or about September 12, 2005 CTR Development, LLC, the owner of the property at that time, entered into an agreement with Sunnyside Utilities for sewer services and paid the \$1,800.00 connection fee. Sunnyside Utilities thereafter allowed the sewer connection to be made to the building currently occupied by Plaintiff. Defendant admits that a true and correct copy of Check No. 5896 made by CTR Development to Sunnyside Utilities is attached as Exhibit "I" to Plaintiff's First Amended Complaint.

24. In answer to paragraph 26, defendant upon information provided by the plaintiff, admits the same.

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25. In answer to paragraph 27, defendant admits that Sunnyside Utilities specifically requested from CTR Development copies of drawings or proposed drawings concerning the building which would be built and located on the premises. Defendant does not have sufficient information to determine whether Plaintiff provided the requested documents or CTR Development provided the requested documents. Therefore, Defendant cannot admit or deny whether or not Plaintiff (as opposed to CTR Development) provided the drawings to Sunnyside Utilities and its officers and/or directors.

26. In answer to paragraph 28, defendant denies the same.

27. In answer to paragraph 29, defendant denies the same.

28. In answer to paragraph 30, Defendant admits that either Plaintiff or CTR Development provided the document attached as Exhibit "K" to Sunnyside Utilities. Defendant denies that Sunnyside Utilities received a fourth page showing the floor plan or layout of the second floor. Sunnyside Utilities was verbally informed that the second floor was to be used solely for storage.

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30. In answer to paragraph 32, defendant admits that there were 10 or 11 connections to the sewer system operated by Sunnyside Utilities in June of 2006. Defendant admits that one of the sewer connections was to the property owned by J&LB Properties and that Plaintiff was occupying J&LP Properties' building. Defendant denies the remainder of the allegations in paragraph 32.

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temporary overload. Defendant admits that Sunnyside Utilities immediately reported the temporary overload to District Seven Health Department and that an onsite investigation was conducted by District Seven Health Department. Defendant denies the remainder of paragraph 33.

32. In answer to paragraph 34, defendant admits that a true and correct copy of the June 28, 2006 letter from District Seven Health Department to Defendant and Sunnyside Utilities is attached as Exhibit "L" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 34.

33. In answer to paragraph 35, Defendant admits that a true and correct copy of the July 6, 2006 letter is attached as Exhibit "M" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 35.

34. In answer to paragraph 36, Defendant admits that an additional septic permit for installation of additional capacity was obtained. Defendant admits that a true and correct copy of the septic permit is attached as Exhibit "N" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 36.

35. In answer to paragraph 37, defendant admits that District Seven Health Department physically inspected the installation of the expansion and repairs of the septic system which were conducted and completed by Sunnyside Utilities. Defendant admits that a true and correct copy of the Septic System Inspection Report is attached to Plaintiff's Amended Complaint as Exhibit "O." Defendant denies the remainder of paragraph 37.

36. In answer to paragraph 38, defendant admits the same.

37. In answer to paragraph 39, defendant admits that a copy of the August 23, 2006 letter from Doyle Beck is attached as Exhibit "Q" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 39.

38. In answer to paragraph 40, defendant admits that a copy of the September 13, 2006 letter from Greg Crockett is attached as Exhibit "R" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 40.

39. In answer to paragraph 41, defendant admits that a copy of the September 6, 2006 letter from Doyle Beck is attached to Plaintiff's Amended Complaint as Exhibit "S". Defendant denies the remainder of paragraph 41.

40. In answer to paragraph 42, defendant admits that Plaintiff requested from Sunnyside Utilities a copy of the contract and rules governing the sewer utility services. Defendant denies the remainder of the allegations in paragraph 42.

41. In answer to paragraph 43, defendant admits that the Third Party Beneficiary Utility Agreement and the Rules and Regulations were provided to Printcraft. Defendant admits that a true and correct copy of Doyle Beck's September 20, 2006 letter is attached as Exhibit "T" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 43.

42. In answer to paragraph 44, defendant admits that Sunnyside Utilities and the plaintiff met at the plaintiff's premises to discuss the issues of the plaintiff's discharges. Defendant admits that plaintiff agreed to collect and dispose of

all substances Sunnyside Utilities classified as "processed waste." Defendant admits that Plaintiff's counsel memorialized the agreement in a letter and that a true and correct copy of such letter is attached as Exhibit "U" to plaintiff's Amended Complaint.

43. In answer to paragraph 45, defendant admits that Kirk Woolf met with the Plaintiff. Defendant admits that the Plaintiff asserted to Mr. Woolf that the Flexo ink was aqueous in nature and not harmful. Defendant denies the remainder of the allegations in paragraph 45.

44. In answer to paragraph 46, defendant admits that a true and correct copy of the October 2, 2006 District Seven Health Department letter is attached as Exhibit "V" to plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 46.

45. In answer to paragraph 47, defendant admits that a true and correct copy of the October 5, 2006 District Seven Health Department letter is attached as Exhibit "W" to the Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 47.

46. In answer to paragraph 48, defendant admits that a dispute arose between District Seven Health Department and the defendants. Defendant asserts that the only issue related to the dispute between District Seven Health Department and the defendants is the temporary overload caused by Plaintiff in June of 2006. Defendant admits that a true and correct copy of the Connected Notice of Intent to Re-impose Sanitary Restrictions,

dated November 21, 2006, is attached as Exhibit "X."

47. In answer to paragraph 49, defendant admits the same.

48. In answer to paragraph 50, defendant admits that Sunnyside Utilities sent the letter attached as Exhibit "Z" to Plaintiff's Amended Complaint. Defendant asserts that the statements therein speak for themselves. Defendant denies the remainder of paragraph 50.

49. In answer to paragraph 51, defendant admits that Sunnyside Utilities received a letter dated December 12, 2006 from Printcraft and that such letter is attached as Exhibit "AA" to Plaintiff's Amended Complaint. Defendant asserts that such letter speaks for itself. Defendant denies the remainder of paragraph 51.

50. In answer to paragraph 52, defendant admits that Sunnyside Utilities sent the letter attached as Exhibit "BB" to the Plaintiff's Amended Complaint. Defendant asserts that the statements therein speak for themselves. Defendant denies the remainder of paragraph 52.

51. In answer to paragraph 53, defendant admits that Sunnyside Utilities severed the sewer connection on December 15, 2006. Defendant does not have sufficient information to either admit or deny the remainder of the allegations in paragraph 53, and therefore denies the same.

52. In answer to paragraph 54, defendant admits that Sunnyside Utilities has provided documents to plaintiff establishing that Sunnyside Utilities' sewer system's capacity from 1996 when it was first constructed and installed through June of 2006 was in the amount of 500 gallons per day. Defendant also

admits that Sunnyside Utilities' sewer system capacity after June 2006 was in the total capacity of 2,000 gallons per day. Defendant admits that evidence of Sunnyside Utilities' sewer system capacities are attached as Exhibit "CC" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 54.

53. In answer to paragraph 55, defendant admits that Sunnyside Utilities provided documentation to Plaintiff that Sunnyside Utilities measured sewer discharge into Sunnyside Utilities' sewer system from February 6, 2007 through May 16, 2007, and that the average amount of such discharges were approximately 370 gallons per day. Defendant admits that a true and correct copy of Sunnyside Utilities' calculations and measurements are attached as Exhibit "DD" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 55.

54. In answer to paragraph 56, defendant admits that Sunnyside Utilities has sufficient capacity to receive all sewer discharges in accordance with the terms of the contract. Defendant admits that plaintiff has demanded reconnection and that Sunnyside Utilities has refused to allow such a reconnection because of the plaintiff's intention to discharge substances and quantities prohibited by Defendant's Rules and Regulations and applicable state and federal law.

55. In answer to paragraph 57, defendant denies the same.

56. In answer to paragraph 58, defendant re-alleges and restates all the factual allegations set forth in paragraphs 1 through 58 and incorporates the same by reference.

57. In answer to paragraph 59, defendant admits the same.

58. In answer to paragraph 60, defendant denies the same.

59. In answer to paragraph 61, defendant denies the same.

60. In answer to paragraph 62, defendant denies the same.

61. In answer to paragraph 63, defendant denies the same.

62. In answer to paragraph 64, defendant admits that it did not record the Third Party Beneficiary Agreement. Defendant denies that Sunnyside Utilities provided sewer services to the Plaintiff merely because Plaintiff was an occupant of the Sunnyside Industrial and Professional Park Subdivision.

63. In answer to paragraph 65, defendant denies the same.

64. In answer to paragraph 66, defendant denies the same.

65. In answer to paragraph 67, defendant admits that Sunnyside Utilities severed the sewer connection. Defendant denies the remainder of the allegations in paragraph 67.

66. In answer to paragraph 68, defendant denies the same.

67. In answer to paragraph 69, defendant denies the same.

68. In answer to paragraph 70, defendant admits the same.

69. In answer to paragraph 71, defendant admits the same.

70. In answer to paragraph 72, defendant denies the same.

71. In answer to paragraph 73, defendant denies the same.

72. In answer to paragraph 74, defendant hereby re-alleges and re-states all the admissions and denials in paragraphs 1 through 73 and incorporates the same herein by reference as if set forth fully.

73. In answer to paragraph 75, defendant denies District Seven Health Department provided a permit for only "one to two buildings" to be connected to Sunnyside Utilities' sewer system.

Defendant asserts that such permit provided for a minimum of "one to two buildings." Defendant admits that District Seven Health Department indicated in April of 2002 that no new sewer connections were to be made to the existing system. Defendant denies that such "indication" had any legally binding effect on Sunnyside Utilities' sewer system or Sunnyside Utilities' ability to connect additional buildings to Sunnyside Utilities' sewer system.

74. In answer to paragraph 76, defendant denies the same.

75. In answer to paragraph 77, defendant denies the same.

76. In answer to paragraph 78, defendant denies the same.

77. In answer to paragraph 79, defendant denies the same.

78. In answer to paragraph 80, defendant denies the same.

79. In answer to paragraph 81, defendant denies the same.

80. In answer to paragraph 82, defendant denies the same.

Defendant denies each and every subpart of paragraph 82.

81. In answer to paragraph 83, defendant denies the same.

82. In answer to paragraph 84, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 83 as set forth herein.

83. In answer to paragraph 85, defendant denies the same.

84. In answer to paragraph 86, defendant denies the same.

Defendant denies each and every subpart of paragraph 86.

85. In answer to paragraph 87, defendant denies the same.

86. In answer to paragraph 88, defendant denies the same.

87. In answer to paragraph 89, defendant denies the same.

88. In answer to paragraph 90, defendant denies the same.

89. In answer to paragraph 91, defendant denies the same.

90. In answer to paragraph 92, defendant denies the same.

91. In answer to paragraph 93, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 92 as set forth herein.

92. In answer to paragraph 94, defendant denies the same.

93. In answer to paragraph 95, defendant denies the same.

94. In answer to paragraph 96, defendant denies the same.

95. In answer to paragraph 97, defendant denies the same.

96. In answer to paragraph 98, defendant denies the same.

97. In answer to paragraph 99, defendant admits that Plaintiff requested any and all documents that would be associated with the property and sewer services provided by Sunnyside Utilities. Defendant admits that, in response, on September 20, 2006, Sunnyside Utilities provided Plaintiff with a copy of the Third Party Beneficiary Utility Agreement and the Sunnyside Utilities Rules and Regulations. Defendant denies the remainder of paragraph 99.

98. In answer to paragraph 100, defendant denies the same.

99. In answer to paragraph 101, defendant denies the same. Defendant denies each and every subpart of paragraph 101.

100. In answer to paragraph 102, defendant denies the same.

101. In answer to paragraph 103, defendant denies the same.

102. In answer to paragraph 104, defendant denies the same.

103. In answer to paragraph 105, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 104 as set forth herein.



104. In answer to paragraph 106, defendant denies the same.

**AFFIRMATIVE DEFENSES**

105. To the extent Plaintiff has failed to satisfy and/or comply with all terms, conditions and provisions, and/or perform all of its obligations under the Third Party Beneficiary Utility Agreement and Sunnyside Utilities' Sewer Rules and Regulations, Plaintiff's claims are barred and all defendants are excused from any duty or performance claimed by Plaintiff.

106. Defendant asserts that the Plaintiff lacks standing to pursue its claims.

107. Defendant asserts that Plaintiff's claims are barred by lack of privity and that Plaintiff is at most an incidental beneficiary of any agreement.

108. Defendant asserts that it has no fiduciary relationship with the Plaintiff.

109. Plaintiff's claims are barred by Plaintiff's breach of the contract.

110. Plaintiff's claims are barred as a result of Plaintiff's own illegal acts.

111. To the extent Plaintiff failed to minimize or avoid some or all of the damage alleged in the Complaint, any recovery against this defendant must be reduced in whole or in part by the amount attributable to such failures.

112. Plaintiff's Amended Complaint, and each claim therein, is barred by the doctrines of waiver and/or estoppel.

113. Plaintiff's Amended Complaint, and each claim therein, is barred by the doctrine of independent intervening cause.

114. The Amended Complaint and each claim therein, is barred by the doctrine of laches.

115. The Amended Complaint, and each claim therein, is barred by the doctrine of unclean hands.

116. Plaintiff has failed to join one or more indispensable parties to this litigation.

117. Plaintiff has failed to set forth its claims with sufficient particularity to permit Defendant to raise all appropriate defenses, and therefore, Defendant reserves the right to seek leave of court to amend or supplement its Answer, including affirmative defenses, to specify further grounds for denying the claims and causes of action that are the subject of this action.

118. By reason of the filing of Plaintiff's Complaint, SIPP has been required to retain the services of an attorney to defend this action and has incurred attorney fees and costs in such defense. In accordance with IRCP 54, Idaho Code §12-120, Idaho Code §12-121, Idaho Code §12-123, and IRCP 11(a)(1), SIPP is entitled to reimbursement of all attorney fees, expenses, and losses incurred herein in defense of Plaintiff's claim and as a result of Plaintiff's actions.

#### PRAYER

WHEREFORE, Sunnyside Industrial and Professional Park, LLC. respectfully requests the following relief against Printcraft Press, Inc.

1. That Printcraft recover nothing by reason of its Amended Complaint and that all such claims be dismissed.

2. That Sunnyside Industrial and Professional Park be awarded all of its costs and attorney fees.

5. For such other relief, legal or equitable, to which Sunnyside has any right or entitlement.

DATED this 19 day of July, 2007.



\_\_\_\_\_  
Mark R. Fuller  
Attorney for Defendant

**DEMAND FOR JURY TRIAL**

Sunnyside Industrial and Professional Park, LLC hereby demands a trial by a twelve (12) person jury on all issues of fact.

DATED this 19 day of July, 2007.



\_\_\_\_\_  
Mark R. Fuller  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this \_\_\_\_\_ day of July, 2007:

Document Served:

SUNNYSIDE INDUSTRIAL AND  
AND PROFESSIONAL PARK'S ANSWER  
TO AMENDED COMPLAINT AND DEMAND  
FOR JURY TRIAL

Attorneys Served:

Lane Erickson, Esq.  
Mitchell Brown, Esq.  
RACINE OLSEN NYE  
P.O. Box 1391  
Pocatello, ID 83204

\_\_\_\_\_ U.S. Mail  
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Mark R. Fuller  
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373

MARK R. FULLER (ISB No. 2698)  
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IDAHO FALLS, ID 83405-0935  
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2007 JUN 12 3:53

ATTORNEY FOR DEFENDANT/COUNTER CLAIMANT SUNNYSIDE PARK UTILITIES, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
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Idaho corporation, )	
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Plaintiff, )	SUNNYSIDE PARK UTILITIES'
)	ANSWER TO AMENDED COMPLAINT,
v. )	COUNTERCLAIMS, AND DEMAND
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SUNNYSIDE PARK UTILITIES, )	
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liability corporation. )	
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Defendant. )	
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SUNNYSIDE PARK UTILITIES' ANSWER TO AMENDED COMPLAINT,  
COUNTERCLAIMS AND DEMAND FOR JURY TRIAL - 1

upon which relief can be granted.

3. In response to paragraph 1, defendant denies that this is an action arising out of certain disclosures the defendant failed to make. Defendant asserts that this is an action arising out of the disconnection of Printcraft Press's sewer connection to Sunnyside Park Utilities. The defendant admits that there is a sewer system located in the Sunnyside Industrial and Professional Park subdivision which is operated and maintained by Sunnyside Park Utilities.

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40. In answer to paragraph 42, defendant admits that Plaintiff requested from Sunnyside Utilities a copy of all documents, contracts, agreements, or the like governing Sunnyside Utilities' sewer utility services. Defendant denies the remainder

of the allegations in paragraph 42.

41. In answer to paragraph 43, defendant admits that the Third Party Beneficiary Utility Agreement and the Rules and Regulations were provided to Printcraft. Defendant admits that a true and correct copy of Doyle Beck's September 20, 2006 letter is attached as Exhibit "T" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 43.

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44. In answer to paragraph 46, defendant admits that a true and correct copy of the October 2, 2006 District Seven Health Department letter is attached as Exhibit "V" to plaintiff's

Amended Complaint. Defendant denies the remainder of the allegations in paragraph 46.

45. In answer to paragraph 47, defendant admits that a true and correct copy of the October 5, 2006 District Seven Health Department letter is attached as Exhibit "W" to the Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 47.

46. In answer to paragraph 48, defendant admits that a dispute arose between District Seven Health Department and the defendants. Defendant asserts that the only issue related to the dispute between District Seven Health Department and the defendants is the temporary overload caused by Plaintiff in June of 2006. Defendant admits that a true and correct copy of the Corrected Notice of Intent to Re-impose Sanitary Restrictions, dated November 21, 2006, is attached as Exhibit "X."

47. In answer to paragraph 49, defendant admits the same.

48. In answer to paragraph 50, defendant admits that Sunnyside Utilities sent the letter attached as Exhibit "Z" to Plaintiff's Amended Complaint. Defendant asserts that the statements therein speak for themselves. Defendant denies the remainder of paragraph 50.

49. In answer to paragraph 51, defendant admits that Sunnyside Utilities received a letter dated December 12, 2006 from Printcraft and that such letter is attached as Exhibit "AA" to Plaintiff's Amended Complaint. Defendant asserts that such letter

speaks for itself. Defendant denies the remainder of paragraph 51.

50. In answer to paragraph 52, defendant admits that Sunnyside Utilities sent the letter attached as Exhibit "BB" to the Plaintiff's Amended Complaint. Defendant asserts that the statements therein speak for themselves. Defendant denies the remainder of paragraph 52.

51. In answer to paragraph 53, defendant admits that it severed the sewer connection on December 15, 2006. Defendant does not have sufficient information to either admit or deny the remainder of the allegations in paragraph 53, and therefore denies the same.

52. In answer to paragraph 54, defendant admits that Sunnyside Utilities has provided documents to plaintiff establishing that Sunnyside Utilities' sewer system's capacity from 1996 when it was first constructed and installed through June of 2006 was in the amount of 500 gallons per day. Defendant also admits that Sunnyside Utilities' sewer system capacity after June 2006 was in the total capacity of 2,000 gallons per day. Defendant admits that evidence of Sunnyside Utilities' sewer system capacities are attached as Exhibit "CC" to Plaintiff's Amended Complaint.

53. In answer to paragraph 55, defendant admits that Sunnyside Utilities provided documentation to Plaintiff that Sunnyside Utilities measured sewer discharge into Sunnyside Utilities' sewer system from February 6, 2007 through May 16,

2007, and that the average amount of such discharges were approximately 370 gallons per day. Defendant admits that a true and correct copy of Sunnyside Utilities' calculations and measurements are attached as Exhibit "DD" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 55.

54. In answer to paragraph 56, defendant admits that it has sufficient capacity to receive all sewer discharges in accordance with the terms of the contract. Defendant admits that plaintiff has demanded reconnection and that Defendant has refused to allow such a reconnection because of the plaintiff's intention to discharge substances and quantities prohibited by Defendant's Rules and Regulations and applicable state and federal law.

55. In answer to paragraph 57, defendant denies the same.

56. In answer to paragraph 58, defendant re-alleges and restates all the factual allegations set forth in paragraphs 1 through 58 and incorporates the same by reference.

57. In answer to paragraph 59, defendant admits the same.

58. In answer to paragraph 60, defendant denies the same.

59. In answer to paragraph 61, defendant denies the same.

60. In answer to paragraph 62, defendant denies the same.

61. In answer to paragraph 63, defendant denies the same.

62. In answer to paragraph 64, defendant admits that it did not record the Third Party Beneficiary Agreement. Defendant denies that it provided sewer services to the Plaintiff merely because Plaintiff was an occupant of the Sunnyside Industrial and

Professional Park Subdivision.

63. In answer to paragraph 65, defendant denies the same.

64. In answer to paragraph 66, defendant denies the same.

65. In answer to paragraph 67, defendant admits that it severed the sewer connection. Defendant denies the remainder of the allegations in paragraph 67.

66. In answer to paragraph 68, defendant denies the same.

67. In answer to paragraph 69, defendant denies the same.

68. In answer to paragraph 70, defendant admits the same.

69. In answer to paragraph 71, defendant admits the same.

70. In answer to paragraph 72, defendant denies the same.

71. In answer to paragraph 73, defendant denies the same.

72. In answer to paragraph 74, defendant hereby re-alleges and re-states all the admissions and denials in paragraphs 1 through 73 and incorporates the same herein by reference as if set forth fully.

73. In answer to paragraph 75, defendant denies District Seven Health Department provided a permit for only "one to two buildings" to be connected to defendants building. Defendant asserts that such permit provided for a minimum of "one to two buildings." Defendant admits that District Seven Health Department indicated in April of 2002 that no new sewer connections were to be made to the existing system. Defendant denies that such "indication" had any legally binding effect on defendant's sewer system or defendant's ability to connect additional buildings to



defendant's sewer system.

74. In answer to paragraph 76, defendant denies the same.

75. In answer to paragraph 77, defendant denies the same.

76. In answer to paragraph 78, defendant denies the same.

77. In answer to paragraph 79, defendant denies the same.

78. In answer to paragraph 80, defendant denies the same.

79. In answer to paragraph 81, defendant denies the same.

80. In answer to paragraph 82, defendant denies the same.

Defendant denies each and every subpart of paragraph 82.

81. In answer to paragraph 83, defendant denies the same.

82. In answer to paragraph 84, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 83 as set forth herein.

83. In answer to paragraph 85, defendant denies the same.

84. In answer to paragraph 86, defendant denies the same.

Defendant denies each and every subpart of paragraph 86.

85. In answer to paragraph 87, defendant denies the same.

86. In answer to paragraph 88, defendant denies the same.

87. In answer to paragraph 89, defendant denies the same.

88. In answer to paragraph 90, defendant denies the same.

89. In answer to paragraph 91, defendant denies the same.

90. In answer to paragraph 92, defendant denies the same.

91. In answer to paragraph 93, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 92 as set forth herein.

92. In answer to paragraph 94, defendant denies the same.

93. In answer to paragraph 95, defendant denies the same.

94. In answer to paragraph 96, defendant denies the same.

95. In answer to paragraph 97, defendant denies the same.

96. In answer to paragraph 98, defendant denies the same.

97. In answer to paragraph 99, defendant admits that Plaintiff requested any and all documents that would be associated with the property and sewer services provided by Sunnyside Utilities. Defendant admits that, in response, on September 20, 2006, Sunnyside Utilities provided Plaintiff with a copy of the Third Party Beneficiary Utility Agreement and the Sunnyside Utilities Rules and Regulations. Defendant denies the remainder of paragraph 99.

98. In answer to paragraph 100, defendant denies the same.

99. In answer to paragraph 101, defendant denies the same. Defendant denies each and every subpart of paragraph 101.

100. In answer to paragraph 102, defendant denies the same.

101. In answer to paragraph 103, defendant denies the same.

102. In answer to paragraph 104, defendant denies the same.

103. In answer to paragraph 105, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 104 as set forth herein.

104. In answer to paragraph 106, defendant denies the same.

#### **AFFIRMATIVE DEFENSES**

SUNNYSIDE PARK UTILITIES' ANSWER TO AMENDED COMPLAINT,  
COUNTERCLAIMS AND DEMAND FOR JURY TRIAL - 14

105. To the extent Plaintiff has failed to satisfy and/or comply with all terms, conditions and provisions, and/or perform all of its obligations under the Third Party Beneficiary Utility Agreement and Sunnyside Utilities' Sewer Rules and Regulations, Plaintiff's claims are barred and defendant is excused from any duty or performance claimed by Plaintiff.

106. Defendant asserts that the Plaintiff lacks standing to pursue its claims.

107. Defendant asserts that Plaintiff's claims are barred by lack of privity and that Plaintiff is at most an incidental beneficiary of any agreement.

108. Defendant asserts that it has no fiduciary relationship with the Plaintiff.

109. Plaintiff's claims are barred by Plaintiff's breach of the contract.

110. Plaintiff's claims are barred as a result of Plaintiff's own illegal acts.

111. To the extent Plaintiff failed to minimize or avoid some or all of the damage alleged in the Complaint, any recovery against this defendant must be reduced in whole or in part by the amount attributable to such failures.

112. Defendant asserts that if Plaintiff is deemed to be entitled to any award of damages against defendant, such award must be offset by amounts owed to Defendant by Plaintiff as set forth in Defendant's Counterclaims hereafter.

113. Plaintiff's Amended Complaint, and each claim therein, is barred by the doctrines of waiver and/or estoppel.

114. Plaintiff's Amended Complaint, and each claim therein, is barred by the doctrine of independent intervening cause.

115. The Amended Complaint and each claim therein, is barred by the doctrine of laches.

116. The Amended Complaint, and each claim therein, is barred by the doctrine of unclean hands.

117. Plaintiff has failed to join one or more indispensable parties to this litigation.

118. The claims in the Complaint are barred by the doctrine of illegality. Defendant cannot contract with Plaintiff to commit an illegal act and enforcement of any such contract is barred. IDAPA 58.01.03.004 prohibits discharge of cooling water, backwash or back flush water, air conditioning water, water softener brine or flows which exceed the design flow of the system, without prior authorization from the Director of Department Seven Health Department. Plaintiff discharged and seeks to discharge the above prohibited substances and excessive flows of process water into the system. Plaintiff has not obtained approval from the Director for discharge of such substances or discharge of flows which exceed the system design and therefore any such discharges into the system would be and are illegal.

119. Plaintiff has failed to set forth its claims with sufficient particularity to permit Defendant to raise all

appropriate defenses, and therefore, Defendant reserves the right to seek leave of court to amend or supplement its Answer, including affirmative defenses, to specify further grounds for denying the claims and causes of action that are the subject of this action.

120. By reason of the filing of Plaintiff's Complaint, Sunnyside Utilities has been required to retain the services of an attorney to defend this action and has incurred attorney fees and costs in such defense. In accordance with IRCP 54, Idaho Code §12-120, Idaho Code §12-121, Idaho Code §12-123, IRCP 11(a)(1), and the Sewer Rules and Regulations, Article IV, Section 2, Sunnyside Utilities is entitled to reimbursement of all attorney fees, expenses, and losses incurred herein in defense of Plaintiff's claim and as a result of Plaintiff's actions.

#### **COUNTERCLAIM**

Sunnyside Park Utilities, Inc., hereby alleges the following counterclaims against Printcraft Press, Inc., pursuant to IRCP 13:

#### **FACTS COMMON TO ALL COUNTERCLAIMS**

1. Sunnyside Park Utilities, Inc., (hereafter "Sunnyside Utilities") is an Idaho corporation with its principle place of business in Bonneville County, Idaho.

2. Sunnyside Utilities engages in the business of providing water and sewer service to the owners and occupants of certain properties, buildings, and other improvements in accordance with the Third Party Beneficiary Utility Agreement and

Sunnyside Utilities' Rules and Regulations.

3. Printcraft Press, Inc., (hereafter "Printcraft") is an Idaho corporation with its principle place of business located at 3834 South Professional Way, Idaho Falls, Bonneville County, Idaho.

4. That jurisdiction and venue of this action arise in Bonneville County, State of Idaho.

5. That pursuant to an agreement with CTR Development, LLC., (hereafter "CTR Development") Sunnyside Utilities agreed to provide water and sewer service to the building located at 3834 South Professional Way, (hereafter "the property").

6. Provision of water and sewer services to CTR Development was to be regulated by the Sunnyside Utilities' Rules and Regulations, the Third Party Beneficiary Utility Agreement, and applicable state and federal rules and regulations. That a copy of such Agreement and applicable Rules and Regulations are attached as Exhibits "A" and "B" to Plaintiff's Original Complaint.

7. In January of 2006, CTR Development sold the property and any rights to use Sunnyside Utilities' sewer services to J&LB Properties, Inc.

8. J&LB Properties, Inc., thereafter entered into a written lease agreement with CTR Management, LLC. (hereafter "CTR Management"). The lease agreement specifically provided that the lessee, CTR Management, was responsible for furnishing and paying

for all utilities and that J&LB Properties had no obligation to furnish any utilities to the building. That a copy of such Lease Agreement is attached as Exhibit "J" to Plaintiff's Amended Complaint.

9. Printcraft is a sub-tenant in the subject property pursuant to an oral, month-to-month sub-lease agreement between Printcraft and CTR Management.

10. Printcraft began discharging wastes into Sunnyside Utilities sewer system on or after January 23, 2006.

11. Printcraft's discharges included hazardous chemicals, water softener brine, reverse osmosis water, fountain concentrate, isopropyl alcohol, ink, and multiple other discharges that were harmful to Sunnyside Utilities' sewer system.

12. In addition, Printcraft discharged wastes in excess of the capacity of Sunnyside Utilities' sewer system.

13. Printcraft never informed Sunnyside Utilities about the types or the quantities of sewer discharges that it intended to put into Sunnyside Utilities' sewer system.

14. Neither Printcraft, nor CTR Management, ever informed Sunnyside Utilities that the lease agreement with J&LB Properties specifically excluded CTR Management and Printcraft Press from using J&LB Properties' rights to the sewer connection with Sunnyside Utilities.

15. Printcraft Press either negligently did not read, or intentionally did not obey the multiple warnings and prohibitions

contained in the Material Safety Data Sheets for the noxious and hazardous chemicals Printcraft discharged into the Sunnyside Utilities' sewer system.

16. On or about June 9, 2006, Printcraft's discharges caused Sunnyside Utilities' sewer system to overload and caused sewage to pond on the ground near Sunnyside Utilities' drain field.

17. Defendant observed significant quantities of ink in the sewage on the ground as a result of the June 9, 2006 overload.

18. On or about July 2, 2006, Sunnyside Utilities obtained a temporary expansion permit and increased the capacity of the sewer system in order to avoid future overloads of the system. At that time Sunnyside Utilities was still unaware of all the various types and quantities of discharges coming from Printcraft into the sewer system.

19. In August 2006, Sunnyside Utilities discovered that Printcraft had been discharging reverse osmosis water, ink, chemicals and other harmful substances into the sewer system.

20. On or about September 6, 2006 Sunnyside Utilities specifically informed Printcraft that the sewer system was only designed to accommodate human waste and that Printcraft needed to control its discharge quantities and cease discharging chemicals, processed water, and ink into the sewer system.

21. On or about September 20, 2006, Sunnyside Utilities provided Printcraft with a copy of the Third Party Beneficiary



Utility Agreement and Sunnyside Utilities' Rules and Regulations.

22. On September 26, 2006, Printcraft Press acknowledged that it was aware of the system limitations and of the disputes with the Department of Environmental Quality and District Seven Health Department as a result of the June, 2006 overload, and promised to collect and dispose of all substances that Sunnyside Utilities classified as "processed wastes," including all reverse osmosis water.

23. In December of 2006, Sunnyside Utilities discovered that Printcraft continued discharging substances that Sunnyside Utilities classified as "processed wastes."

24. On December 11, 2006, Sunnyside Utilities sent a letter to Printcraft, demanding that Printcraft cease all discharges of "processed wastes" immediately.

25. On December 13, 2006, Sunnyside Utilities again requested that Printcraft cease all discharges of "processed wastes" and informed Printcraft that it must allow monitoring of its discharges if Printcraft desired to continue receiving sewer services. Printcraft refused to allow its discharges to be monitored only because Printcraft was knowingly and intentionally discharging "processed wastes" and had no intention of ceasing to discharge "processed wastes" despite the agreement reached between Printcraft and Sunnyside Utilities on or about September 26, 2006.

26. On December 15, 2006, Sunnyside Utilities severed the sewer connection to the building Printcraft is occupying.

27. On December 19, 2006, Printcraft caused its newly installed alternative sewer system, with a capacity of 1,000 gallons to overload, allowing sewage to pond on the ground near Printcraft's building. Multiple additional overloads have occurred.

28. On December 20, 2006, the Department of Environmental Quality conducted an investigation of the sewage on the ground and determined that "Odor of wastewater smelled like ink. Color of wastewater was a dark blue to black color." A copy of the investigation letter dated January 5, 2007 is attached as Exhibit "1."

29. The investigation by the Department of Environmental Quality, only five days after Sunnyside Utilities severed the sewer connection, confirms that Printcraft was discharging "processed wastes."

**COUNT I: BREACH OF CONTRACT**

30. Defendant re-alleges paragraphs 1 through 25 by reference.

31. Defendant and Plaintiff entered into a binding contractual relationship as follows:

a. On September 6, 2006, Defendant informed Plaintiff that Defendant's sewer system had capacity only to collect and dispose of "human waste" and that no other wastes would be allowed into the system.

b. On September 19, 2006, Plaintiff requested a copy of

any contracts, agreements, documents, or the like, which were applicable to parties receiving sewer services from Sunnyside Utilities.

c. On September 20, 2006, Defendant provided Plaintiff with Defendant's Third Party Beneficiary Utility Agreement and Defendant's Rules and Regulations for sewer service. Such Rules and Regulations specifically define "sewage" as blackwaste or blackwater (also known as "human wastes") and specifically excludes a lengthy list of "processed wastes" from being discharged into the sewer system.

d. On or about September 26, 2006, Plaintiff agreed to abide by Defendant's Rules and Regulations for sewer service stating that it agreed not to discharge any substance Defendant classified as "processed waste" into Sunnyside Utilities' sewer system.

e. Defendant accepted Plaintiff's sewer discharges in exchange for Plaintiff's payment of the monthly sewer service fee.

32. Defendant substantially performed its obligations under the contract from September 26, 2006 until December 15, 2006 and did not materially breach the contract.

33. Plaintiff breached the contract by discharging water softener brine, hazardous chemicals, substances that are harmful to Defendant's sewer facilities, inks, and excessive flow of discharges.

34. As a direct result of the acts of Plaintiff, Defendant was required disconnect Plaintiff from the sewer system on December 15, 2006. The costs of such disconnection included \$1,228.64 for a backhoe and operator to perform the disconnection and \$1,420.00 for inspection and supervision by the Defendant.

35. As a direct and proximate result of the breaches of contract by Plaintiff, Defendant is entitled to damages of \$2,648.64 or such other amount as may be proven at trial.

36. In accordance with IRCP 54, Idaho Code §12-120, 12-121, 12-123, IRCP 11(a)(1), and the Sewer Rules and Regulations, Article IV, Section 2, Sunnyside Park Utilities is entitled to reimbursement of all attorney fees, expenses, and losses incurred herein in prosecution of Sunnyside Park Utilities' counterclaims.

**COUNT II. COVENANT OF GOOD FAITH AND FAIR DEALING**

37. Sunnyside Park Utilities re-alleges paragraphs 1 through 32 by reference.

38. The contract between these parties includes material implied covenants.

39. Implied in every contract is a covenant that the parties will act in good faith and fair dealing with each other with respect to the terms of the contract.

40. Printcraft has failed to deal fairly with and act in good faith towards Sunnyside Park Utilities and has breached the implied covenant of good faith and fair dealing.

41. Printcraft's breach of the implied covenant of good

faith and fair dealing has unfairly frustrated Sunnyside Park Utilities' right to receive the benefits of the contract.

42. Printcraft's breach of the implied covenant of good faith and fair dealing is a material breach of the contract and is the direct and proximate cause of damages suffered by Sunnyside Park Utilities, which damages are continuing.

43. Sunnyside Park Utilities has suffered damages and will hereafter suffer damages in an amount to be proven at trial in excess of the jurisdictional amount of this Court.

### **COUNT III. NEGLIGENCE**

44. Sunnyside Park Utilities re-alleges paragraphs 1 through 39 by reference.

45. Printcraft has a duty not to allow its sewer discharges to cause unreasonable, foreseeable risks of harm to third parties.

46. Printcraft breached its duty by failing to exercise reasonable care in following the warnings and directions on the Material and Safety Data Sheets provided to Printcraft by the manufacturers.

47. Printcraft further breached its duty by failing to exercise reasonable care to ensure that Printcraft's discharges were not harmful to Sunnyside Park Utilities' sewer system and facilities and that Printcraft's discharges did not exceed the capacity of Sunnyside Park Utilities' sewer system.

48. Printcraft further breached its duty by discharging illegal substances and hazardous chemicals into Sunnyside Park

Utilities sewer facilities.

49. Printcraft's breaches were the direct and proximate cause of the temporary overload in Sunnyside Park Utilities' sewer system during June of 2006.

50. Printcraft's breaches were the direct and proximate cause of all damages arising out of the temporary overload, including an expansion of the sewer system, treatment of the on-the-ground sewage, all costs and fees related to the ongoing dispute with District Seven Health Department, and all costs and fees related to the ongoing dispute with the Department of Environmental Quality. The costs of such expansion, treatment, and disputes through December, 2006 are as follows:

Construction Permit:	\$ 200.00
Purchase of Additional Septic Tanks:	\$ 1,725.00
Valves from Falls Plumbing Supply:	\$ 124.27
Cost of Excavation, Drain Field	
Supplies, Meter Reading and Supervision:	\$ 9,758.81
Attorney Fees through December, 2006:	\$26,818.97
Cost for Emergency Excavator and	
and Operator to Excavate and Install	
Tanks and Piping:	\$ 2,430.00
Cost for lime to neutralize overflow:	<u>\$ 1,202.82</u>
TOTAL	\$42,259.87

In addition, if this Defendant is required to construct a large soil absorption system, and/or to abandon its current system, as a result of the acts of Plaintiff, Defendant will also seek as damages the cost of such construction, and/or abandonment, in an amount to be proven at trial. Defendant's attorney fees and costs related to the District Seven Health Department and Department of Environmental Quality litigation continue to increase.

51. Defendant is entitled to be compensated for its damages in the amount of \$42,259.87, and its continuing damages in an amount as will be proven at trial.

**PRAYER**

WHEREFORE, Sunnyside Park Utilities, Inc. respectfully requests the following relief against Printcraft Press, Inc.

1. That Printcraft recover nothing by reason of its Amended Complaint and that all such claims be dismissed.

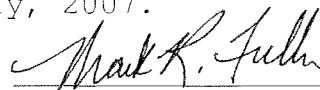
2. That Sunnyside Park Utilities be awarded its damages for Printcraft's breach of contract in the amount of \$2,648.64, or such amount as may be proven at trial.

3. That Sunnyside Park Utilities be awarded its damages caused by Printcraft's negligent discharges in the amount of \$42,259.87, together with continuing damages as may be proven at trial.

4. That Sunnyside be awarded all of its costs and attorney fees.

5. For such other relief, legal or equitable, to which Sunnyside has any right or entitlement.

DATED this 19 day of July, 2007.




Mark R. Fuller  
Attorney for Defendant

**DEMAND FOR JURY TRIAL**

Sunnyside Park Utilities hereby demands a trial by a twelve (12) person jury on all issues of fact.

DATED this 19 day of July, 2007.



Mark R. Fuller  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this 19 day of July, 2007:

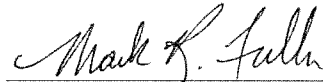
Document Served:

SUNNYSIDE PARK UTILITIES' ANSWER  
TO AMENDED COMPLAINT,  
COUNTERCLAIMS AND DEMAND FOR  
JURY TRIAL

Attorneys Served:

Lane Erickson, Esq.  
Mitchell Brown, Esq.  
RACINE OLSEN NYE  
P.O. Box 1391  
Pocatello, ID 83204

\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Facsimile  
+ \_\_\_\_\_ Hand Delivery



Mark R. Fuller  
FULLER & CARR





STATE OF IDAHO  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

RECEIVED

JAN - 8 2007

Office of the Attorney General  
IDEQ

900 NORTH SKYLINE DRIVE, SUITE B • IDAHO FALLS, IDAHO 83402 • (208) 526-2650

JAMES E. RISCH, GOVERNOR  
TONI HARDESTY, DIRECTOR

January 5, 2007

Travis Waters  
Print Craft Press  
3834 S. Professional Way  
Idaho Falls, ID 83402

### Open Sewage Complaint Investigation

Dear Mr. Waters:

On December 20, 2006, District Seven Health Department referred an open sewage complaint to DEQ. The complaint received by the District Seven Health Department on December 19, 2006 at 4:10 pm consisted of a large tank leaking sewage onto the ground in front of the Printcraft Press facility located in Sunnyside Industrial Park.

Charlie Mazzone and Greg Eager of DEQ arrived at Print Craft Press (3834 S. Professional Way, Idaho Falls), site of the open sewage complaint, at 10:30 am. DEQ met with Terry Luzier of Printcraft. An investigation was conducted by DEQ in accordance with DEQ's Open Sewage Complaint Investigation Protocol. A copy of the protocol was provided to Mr. Luzier. The investigation revealed Printcraft's sewer connection was disconnected from Sunnyside Industrial Park's collection system. Printcraft's sewer line was fitted with a sump pump discharging to a 1000 gallon plastic tank. There was wastewater on the ground below the tank outlet from leakage of the plastic pipe fittings. Rough estimated volume of spill appeared to be 1-2 gallons of frozen wastewater. Mr. Luzier said wastewater contained employee waste and printing wastewater. Odor of wastewater smelled like ink. Color of wastewater was a dark blue to black color.

DEQ requested that frozen wastewater spill and soil be excavated and disposed of properly. DEQ recommended plastic pipe fitting be sealed. DEQ suggested a containment vessel be placed under the outlet pipe to catch any leakage. While Printcraft resolves the sewer connection issue with Sunnyside Park Utilities, DEQ stated the volumes in the tank need management and periodic pumping to prevent further discharge to the ground. Mr. Luzier concurred with the recommendations and would have an employee immediately address the issues. He would contact a licensed pumper to collect and truck the wastewater to the Idaho Falls Wastewater Treatment Plant. These temporary measures should mitigate the public health hazard of open sewage.

DEQ collected samples for coliform density, TSS and BOD analyses. On December 28, 2006 Energy Laboratories reported the following results:

TSS 57 mg/l  
E. coliform > 1400 mpn/100ml  
BOD Laboratory had a QA/QC error and was not able to run the samples.

Due to laboratory error, Charlie Mazzone collected another wastewater sample from the tank on December 28, 2006. He noted a container had been placed under the outlet leak and contained some frozen wastewater and the ground had been cleaned up from the previous wastewater spill.

On January 4, 2007 Energy Laboratories reported the following results:

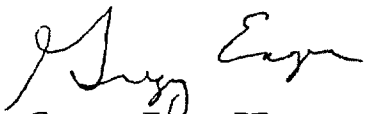
TSS 100 mg/l  
E. coliform 3724 mpn/100ml  
BOD 260 mg/l

The laboratory analyses reports indicate the wastewater has the biological and physical characteristics of domestic sewage. Table 4-3 of USEPA 1980 Design Manual is attached and shows domestic wastewater characteristics.

DEQ did not attempt to characterize the non-domestic characteristics of Printcraft's wastewater. DEQ requests the material safety data sheets of solutions used in Printcraft's operation be submitted to this office.

If you have any questions in regard to this letter, please call me at (208) 528-2650.

Sincerely,



Gregory Eager, PE  
Regional Manager Engineering  
Idaho Falls Region

Attachments

C: James Johnston, Regional Administrator  
Willie Teuscher, DEQ  
Barry Burnell, DEQ State Office  
AJ Maupin, DEQ State Office  
Stephanie Ebright, AG Office  
D7HD, Environmental Health

MARK R. FULLER (ISB No. 2698)  
FULLER & CARR  
410 MEMORIAL DRIVE, SUITE 201  
P.O. Box 50935  
IDAHO FALLS, ID 83405-0935  
TELEPHONE: (208) 524-5400

2007 JUL 19 11 53  
CLERK OF DISTRICT COURT  
IDAHO FALLS, IDAHO

ATTORNEY FOR DEFENDANT SUNNYSIDE PARK OWNERS ASSOCIATION, INC.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF BONNEVILLE**

PRINTCRAFT PRESS, INC., an )	Case No. CV-06-7097
Idaho corporation, )	
)	
Plaintiff, )	SUNNYSIDE PARK OWNERS
)	ASSOCIATION'S ANSWER TO
v. )	AMENDED COMPLAINT AND
)	DEMAND FOR JURY TRIAL
)	
SUNNYSIDE PARK UTILITIES, )	
INC., an Idaho corporation, )	
SUNNYSIDE PARK OWNERS )	
ASSOCIATION, INC., an Idaho )	
corporation, and SUNNYSIDE )	
INDUSTRIAL AND PROFESSIONAL )	
PARK, LLC, an Idaho limited )	
liability corporation. )	
)	
Defendant. )	
)	
)	
)	

COMES NOW the Defendant, Sunnyside Park Owners Association, Inc., an Idaho corporation (hereafter "SPOA"), and in response to the Amended Complaint filed by Plaintiff, states and alleges as follows:

1. Defendant denies each and every allegation set forth in the Amended Complaint except as expressly admitted herein.
2. Plaintiff's Complaint fails to state a cause of action

upon which relief can be granted.

3. In response to paragraph 1, defendant denies that this is an action arising out of certain disclosures the defendant failed to make. Defendant asserts that this is an action arising out of the disconnection of Printcraft Press's sewer connection to Sunnyside Park Utilities, Inc. "hereafter "Sunnyside Utilities"). The defendant admits that there is a sewer system located in the Sunnyside Industrial and Professional Park subdivision which is operated and maintained by Sunnyside Utilities.

4. In answer to paragraphs 2, 3, 4, and 5, defendant admits the same.

5. In answer to paragraphs 6 and 7 defendant admits the same.

6. In answer to paragraph 8, defendant admits that Sunnyside Industrial and Professional Park, LLC (hereafter "SIPP") completed and filed with District Seven Health Department a septic permit for the installation of a septic system that would service a minimum of one to two buildings. Defendant admits that a copy of District Seven Health Department's septic permit is attached as Exhibit "A" to the Complaint.

7. In answer to paragraph 9, defendant admits the same.

8. In answer to paragraph 10, defendant admits the same.

9. In answer to paragraph 11, defendant admits that on August 4, 1999, SIPP and Bonneville County entered into a Development Agreement. The defendant denies that SIPP promised to provide all street improvements and utilities as were necessary to be completed. The agreement specifically states that the

"owner(s)" will construct said needed utility or street improvements. The agreement does not obligate the "Developer" to construct needed utility or street improvements.

10. In answer to paragraph 12, defendant admits the same.

11. In answer to paragraph 13, defendant denies the same.

12. In answer to paragraph 14, defendant admits the same.

13. In answer to paragraph 15, defendant admits that a meeting was held. However, defendant denies the remainder of the allegations contained in paragraph 15.

14. In answer to paragraph 16, defendant admits the same.

15. In answer to paragraph 17, defendant denies that the letter sent by District Seven Health Department memorialized the meeting held on March 29, 2002. Defendant admits that the letter attached as Exhibit "F" to Plaintiff's complaint is a true and correct copy of the letter sent by District Seven Health Department.

16. In answer to paragraph 18, defendant denies that Sunnyside Utilities entered into an agreement with the Defendant Sunnyside Park Owners Association, Inc. (hereafter "SPOA") for the providing of water and sewer services to the subdivision identified in the plat map. Defendant asserts that Sunnyside Utilities entered into an agreement with SPOA, to provide sewer services to past, present, and future owners and occupants of any subdivisions which were being or might one day be served by Sunnyside Utilities' sewer facilities.

17. In answer to paragraph 19, defendant admits the same.

18. In answer to paragraph 20, defendant admits that the

Third Party Beneficiary Agreement states: "This Agreement shall also be binding upon and shall inure to the benefit of...all present and future owners or occupants." Defendant denies the remainder of paragraph 20.

19. In answer to paragraph 21, Defendant admits the same.

20. In answer to paragraph 22, Defendant denies that the Agreement is only binding on Plaintiff if the Agreement was recorded. Defendant specifically denies that the Agreement contains specific language in several places indicating that the Third Party Beneficiary Agreement would be recorded "so as to put all persons on notice that any properties receiving sewer services would be subject to the terms of the Agreement." Defendant admits that a true and correct copy of the Third Party Beneficiary Utility Agreement is attached as Exhibit "G" to plaintiff's Complaint.

21. In answer to paragraph 23, defendant admits the same.

22. In answer to paragraph 24, defendant admits the same.

23. In answer to paragraph 25, defendant admits that on or about September 12, 2005 CTR Development, LLC, the owner of the property at that time, entered into an agreement with Sunnyside Utilities for sewer services and paid the \$1,800.00 connection fee. Sunnyside Utilities thereafter allowed the sewer connection to be made to the building currently occupied by Plaintiff. Defendant admits that a true and correct copy of Check No. 5896 made by CTR Development to Sunnyside Utilities is attached as Exhibit "I" to Plaintiff's First Amended Complaint.

24. In answer to paragraph 26, defendant upon information

provided by the plaintiff, admits the same.

25. In answer to paragraph 27, defendant admits that Sunnyside Utilities specifically requested from CTR Development copies of drawings or proposed drawings concerning the building which would be built and located on the premises. Defendant does not have sufficient information to determine if Plaintiff provided the requested documents or CTR Development provided the requested documents. Therefore, Defendant cannot admit or deny whether or not Plaintiff (as opposed to CTR Development) provided the drawings to Sunnyside Utilities and its officers and/or directors.

26. In answer to paragraph 28, defendant denies the same.

27. In answer to paragraph 29, defendant denies the same.

28. In answer to paragraph 30, Defendant admits that either Plaintiff or CTR Development provided the document attached as Exhibit "K" to Sunnyside Utilities. Defendant denies that Sunnyside Utilities received a fourth page showing the floor plan or layout of the second floor. Sunnyside Utilities was verbally informed that the second floor was to be used solely for storage.

29. In answer to paragraph 31, defendant admits the same.

30. In answer to paragraph 32, defendant admits that there were 10 or 11 connections to the sewer system operated by Sunnyside Utilities in June of 2006. Defendant admits that one of the sewer connections was to the property owned by J&LB Properties and that Plaintiff was occupying J&LP Properties' building. Defendant denies the remainder of the allegations in paragraph 32.

31. In answer to paragraph 33, defendant admits that in June 2006, Sunnyside Utilities' sewer system experienced a

temporary overload. Defendant admits that Sunnyside Utilities immediately reported the temporary overload to District Seven Health Department and that an onsite investigation was conducted by District Seven Health Department. Defendant denies the remainder of paragraph 33.

32. In answer to paragraph 34, defendant admits that a true and correct copy of the June 28, 2006 letter from District Seven Health Department to SIPP and Sunnyside Utilities is attached as Exhibit "L" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 34.

33. In answer to paragraph 35, Defendant admits that a true and correct copy of the July 6, 2006 letter is attached as Exhibit "M" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 35.

34. In answer to paragraph 36, Defendant admits that an additional septic permit for installation of additional capacity was obtained. Defendant admits that a true and correct copy of the septic permit is attached as Exhibit "N" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 36.

35. In answer to paragraph 37, defendant admits that District Seven Health Department physically inspected the installation of the expansion and repairs of the septic system which were conducted and completed by Sunnyside Utilities. Defendant admits that a true and correct copy of the Septic System Inspection Report is attached to Plaintiff's Amended Complaint as Exhibit "O." Defendant denies the remainder of paragraph 37.



36. In answer to paragraph 38, defendant admits the same.

37. In answer to paragraph 39, defendant admits that a copy of the August 23, 2006 letter from Doyle Beck is attached as Exhibit "Q" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 39.

38. In answer to paragraph 40, defendant admits that a copy of the September 13, 2006 letter from Greg Crockett is attached as Exhibit "R" to Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 40.

39. In answer to paragraph 41, defendant admits that a copy of the September 6, 2006 letter from Doyle Beck is attached to Plaintiff's Amended Complaint as Exhibit "S". Defendant denies the remainder of paragraph 41.

40. In answer to paragraph 42, defendant admits that Plaintiff requested from Sunnyside Utilities a copy of the contract and rules governing the sewer utility services. Defendant denies the remainder of the allegations in paragraph 42.

41. In answer to paragraph 43, defendant admits that the Third Party Beneficiary Utility Agreement and the Rules and Regulations were provided to Printcraft. Defendant admits that a true and correct copy of Doyle Beck's September 20, 2006 letter is attached as Exhibit "T" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 43.

42. In answer to paragraph 44, defendant admits that Sunnyside Utilities and the plaintiff met at the plaintiff's premises to discuss the issues of the plaintiff's discharges.

Defendant admits that plaintiff agreed to collect and dispose of all substances Sunnyside Utilities classified as "processed waste." Defendant admits that Plaintiff's counsel memorialized the agreement in a letter and that a true and correct copy of such letter is attached as Exhibit "U" to plaintiff's Amended Complaint.

43. In answer to paragraph 45, defendant admits that Kirk Woolf met with the Plaintiff. Defendant admits that the Plaintiff asserted to Mr. Woolf that the Flexo ink was aqueous in nature and not harmful. Defendant denies the remainder of the allegations in paragraph 45.

44. In answer to paragraph 46, defendant admits that a true and correct copy of the October 2, 2006 District Seven Health Department letter is attached as Exhibit "V" to plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 46.

45. In answer to paragraph 47, defendant admits that a true and correct copy of the October 5, 2006 District Seven Health Department letter is attached as Exhibit "W" to the Plaintiff's Amended Complaint. Defendant denies the remainder of the allegations in paragraph 47.

46. In answer to paragraph 48, defendant admits that a dispute arose between District Seven Health Department and the defendants. Defendant asserts that the only issue related to the dispute between District Seven Health Department and the defendants is the temporary overload caused by Plaintiff in June of 2006. Defendant admits that a true a correct copy of the

Corrected Notice of Intent to Re-impose Sanitary Restrictions, dated November 21, 2006, is attached as Exhibit "X."

47. In answer to paragraph 49, defendant admits the same.

48. In answer to paragraph 50, defendant admits that Sunnyside Utilities sent the letter attached as Exhibit "Z" to Plaintiff's Amended Complaint. Defendant asserts that the statements therein speak for themselves. Defendant denies the remainder of paragraph 50.

49. In answer to paragraph 51, defendant admits that Sunnyside Utilities received a letter dated December 12, 2006 from Printcraft and that such letter is attached as Exhibit "AA" to Plaintiff's Amended Complaint. Defendant asserts that such letter speaks for itself. Defendant denies the remainder of paragraph 51.

50. In answer to paragraph 52, defendant admits that Sunnyside Utilities sent the letter attached as Exhibit "BB" to the Plaintiff's Amended Complaint. Defendant asserts that the statements therein speak for themselves. Defendant denies the remainder of paragraph 52.

51. In answer to paragraph 53, defendant admits that Sunnyside Utilities severed the sewer connection on December 15, 2006. Defendant does not have sufficient information to either admit or deny the remainder of the allegations in paragraph 53, and therefore denies the same.

52. In answer to paragraph 54, defendant admits that Sunnyside Utilities has provided documents to plaintiff establishing that Sunnyside Utilities' sewer system's capacity from 1996 when it was first constructed and installed through June

of 2006 was in the amount of 500 gallons per day. Defendant also admits that Sunnyside Utilities' sewer system capacity after June 2006 was in the total capacity of 2,000 gallons per day. Defendant admits that evidence of Sunnyside Utilities' sewer system capacities are attached as Exhibit "CC" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 54.

53. In answer to paragraph 55, defendant admits that Sunnyside Utilities provided documentation to Plaintiff that Sunnyside Utilities measured sewer discharge into Sunnyside Utilities' sewer system from February 6, 2007 through May 16, 2007, and that the average amount of such discharges were approximately 370 gallons per day. Defendant admits that a true and correct copy of Sunnyside Utilities' calculations and measurements are attached as Exhibit "DD" to Plaintiff's Amended Complaint. Defendant denies the remainder of paragraph 55.

54. In answer to paragraph 56, defendant admits that Sunnyside Utilities has sufficient capacity to receive all sewer discharges in accordance with the terms of the contract. Defendant admits that plaintiff has demanded reconnection and that Sunnyside Utilities has refused to allow such a reconnection because of the plaintiff's intention to discharge substances and quantities prohibited by Sunnyside Utilities' Rules and Regulations and applicable state and federal law.

55. In answer to paragraph 57, defendant denies the same.

56. In answer to paragraph 58, defendant re-alleges and restates all the factual allegations set forth in paragraphs 1 through 58 and incorporates the same by reference.

57. In answer to paragraph 59, defendant admits the same.

58. In answer to paragraph 60, defendant denies the same.

59. In answer to paragraph 61, defendant denies the same.

60. In answer to paragraph 62, defendant denies the same.

61. In answer to paragraph 63, defendant denies the same.

62. In answer to paragraph 64, defendant admits that it did not record the Third Party Beneficiary Agreement. Defendant denies that it provided sewer services to the Plaintiff merely because Plaintiff was an occupant of the Sunnyside Industrial and Professional Park Subdivision.

63. In answer to paragraph 65, defendant denies the same.

64. In answer to paragraph 66, defendant denies the same.

65. In answer to paragraph 67, defendant admits that Sunnyside Utilities severed the sewer connection. Defendant denies the remainder of the allegations in paragraph 67.

66. In answer to paragraph 68, defendant denies the same.

67. In answer to paragraph 69, defendant denies the same.

68. In answer to paragraph 70, defendant admits the same.

69. In answer to paragraph 71, defendant admits the same.

70. In answer to paragraph 72, defendant denies the same.

71. In answer to paragraph 73, defendant denies the same.

72. In answer to paragraph 74, defendant hereby re-alleges and re-states all the admissions and denials in paragraphs 1 through 73 and incorporates the same herein by reference as if set forth fully.

73. In answer to paragraph 75, defendant denies District Seven Health Department provided a permit for only "one to two

buildings" to be connected to Sunnyside Utilities' sewer system. Defendant asserts that such permit provided for a minimum of "one to two buildings." Defendant admits that District Seven Health Department indicated in April of 2002 that no new sewer connections were to be made to the existing system. Defendant denies that such "indication" had any legally binding effect on Sunnyside Utilities' sewer system or Sunnyside Utilities' ability to connect additional buildings to Sunnyside Utilities' sewer system.

74. In answer to paragraph 76, defendant denies the same.

75. In answer to paragraph 77, defendant denies the same.

76. In answer to paragraph 78, defendant denies the same.

77. In answer to paragraph 79, defendant denies the same.

78. In answer to paragraph 80, defendant denies the same.

79. In answer to paragraph 81, defendant denies the same.

80. In answer to paragraph 82, defendant denies the same.

Defendant denies each and every subpart of paragraph 82.

81. In answer to paragraph 83, defendant denies the same.

82. In answer to paragraph 84, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 83 as set forth herein.

83. In answer to paragraph 85, defendant denies the same.

84. In answer to paragraph 86, defendant denies the same.

Defendant denies each and every subpart of paragraph 86.

85. In answer to paragraph 87, defendant denies the same.

86. In answer to paragraph 88, defendant denies the same.

87. In answer to paragraph 89, defendant denies the same.

88. In answer to paragraph 90, defendant denies the same.

89. In answer to paragraph 91, defendant denies the same.

90. In answer to paragraph 92, defendant denies the same.

91. In answer to paragraph 93, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through 92 as set forth herein.

92. In answer to paragraph 94, defendant denies the same.

93. In answer to paragraph 95, defendant denies the same.

94. In answer to paragraph 96, defendant denies the same.

95. In answer to paragraph 97, defendant denies the same.

96. In answer to paragraph 98, defendant denies the same.

97. In answer to paragraph 99, defendant admits that Plaintiff requested any and all documents that would be associated with the property and sewer services provided by Sunnyside Utilities. Defendant admits that, in response, on September 20, 2006, Sunnyside Utilities provided Plaintiff with a copy of the Third Party Beneficiary Utility Agreement and the Sunnyside Utilities Rules and Regulations. Defendant denies the remainder of paragraph 99.

98. In answer to paragraph 100, defendant denies the same.

99. In answer to paragraph 101, defendant denies the same. Defendant denies each and every subpart of paragraph 101.

100. In answer to paragraph 102, defendant denies the same.

101. In answer to paragraph 103, defendant denies the same.

102. In answer to paragraph 104, defendant denies the same.

103. In answer to paragraph 105, defendant hereby re-alleges and re-states its admissions and denials to paragraphs 1 through

104 as set forth herein.

104. In answer to paragraph 106, defendant denies the same.

**AFFIRMATIVE DEFENSES**

105. To the extent Plaintiff has failed to satisfy and/or comply with all terms, conditions and provisions, and/or perform all of its obligations under the Third Party Beneficiary Utility Agreement and Sunnyside Utilities' Sewer Rules and Regulations, Plaintiff's claims are barred and all defendants are excused from any duty or performance claimed by Plaintiff.

106. Defendant asserts that the Plaintiff lacks standing to pursue its claims.

107. Defendant asserts that Plaintiff's claims are barred by lack of privity and that Plaintiff is at most an incidental beneficiary of any agreement.

108. Defendant asserts that it has no fiduciary relationship with the Plaintiff.

109. Plaintiff's claims are barred by Plaintiff's breach of the contract.

110. Plaintiff's claims are barred as a result of Plaintiff's own illegal acts.

111. To the extent Plaintiff failed to minimize or avoid some or all of the damage alleged in the Complaint, any recovery against this defendant must be reduced in whole or in part by the amount attributable to such failures.

112. Plaintiff's Amended Complaint, and each claim therein, is barred by the doctrines of waiver and/or estoppel.

113. Plaintiff's Amended Complaint, and each claim therein,

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is barred by the doctrine of independent intervening cause.

114. The Amended Complaint and each claim therein, is barred by the doctrine of laches.

115. The Amended Complaint, and each claim therein, is barred by the doctrine of unclean hands.

116. Plaintiff has failed to join one or more indispensable parties to this litigation.

117. Plaintiff has failed to set forth its claims with sufficient particularity to permit Defendant to raise all appropriate defenses, and therefore, Defendant reserves the right to seek leave of court to amend or supplement its Answer, including affirmative defenses, to specify further grounds for denying the claims and causes of action that are the subject of this action.

118. By reason of the filing of Plaintiff's Complaint, SPOA has been required to retain the services of an attorney to defend this action and has incurred attorney fees and costs in such defense. In accordance with IRCP 54, Idaho Code §12-120, Idaho Code §12-121, Idaho Code §12-123 and IRCP 11(a)(1), SPOA is entitled to reimbursement of all attorney fees, expenses, and losses incurred herein in defense of Plaintiff's claim and as a result of Plaintiff's actions.

#### PRAYER

WHEREFORE, Sunnyside Park Owners Association, Inc. respectfully requests the following relief against Printcraft Press, Inc.

1. That Printcraft recover nothing by reason of its

Amended Complaint and that all such claims be dismissed.

2. That Sunnyside Park Owners Association be awarded all of its costs and attorney fees.

5. For such other relief, legal or equitable, to which Sunnyside has any right or entitlement.

DATED this 19 day of July, 2007.




\_\_\_\_\_  
Mark R. Fuller  
Attorney for Defendant

**DEMAND FOR JURY TRIAL**

Sunnyside Park Owners Association hereby demands a trial by a twelve (12) person jury on all issues of fact.

DATED this 19 day of July, 2007.



\_\_\_\_\_  
Mark R. Fuller  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this 19 day of July, 2007:

Document Served:

SUNNYSIDE PARK OWNERS  
ASSOCIATION'S ANSWER  
TO AMENDED COMPLAINT,  
AND DEMAND FOR JURY TRIAL

Attorneys Served:

Lane Erickson, Esq.  
Mitchell Brown, Esq.  
RACINE OLSEN NYE  
P.O. Box 1391  
Pocatello, ID 83204

\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Facsimile  
  x   Hand Delivery

  
\_\_\_\_\_  
Mark R. Fuller  
FULLER & CARR

BONNEVILLE COUNTY

Mitchell W. Brown (ISB#: 4202)  
Lane V. Erickson (ISB#: 5979)  
RACINE, OLSON, NYE,  
BUDGE & BAILEY, CHARTERED  
P.O. Box 1391  
Pocatello, Idaho 83204-1391  
Telephone: (208)232-6101  
Fax: (208)232-6109

7-20-06 PM 2:27

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

PRINCRAFT PRESS, INC. an Idaho  
corporation,

Plaintiff,

vs.

SUNNYSIDE PARK UTILITIES, INC. an  
Idaho corporation, SUNNYSIDE PARK  
OWNERS ASSOCIATION, INC., an  
Idaho corporation, and SUNNYSIDE  
INDUSTRIAL AND PROFESSIONAL  
PARK, LLC, an Idaho limited liability  
corporation,

Defendants.

Case No. CV-06-7097

**AFFIDAVIT OF LUKE BOYLE  
(J&LB PROPERTIES, INC.) IN  
OPPOSITION TO  
THE DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT**

STATE OF IDAHO                    )  
  : ss  
County of Bonneville            )

LUKE BOYLE, after first being duly sworn on oath, deposes and states as follows:

1. I am over the age of 18 and, am competent to testify and the information  
contained in this affidavit is made upon my own knowledge;

2. I am an officer of the company known as J&LB Properties, Inc.

3. On January 23, 2006, J&LB Properties, Inc., purchased property within the Sunnyside Industrial and Professional Park, which consisted of Block 1, Lot 5, by way of a Grant Deed from CTR Development, LLC.

4. On or about January 23, 2006, J&LB Properties, Inc., entered into a written Lease Agreement with CTR Management, LLC, with regard to leasing the premises.

5. The understanding between J&LB, CTR and the Plaintiff was that the lessees of the premises would be responsible to pay for and obtain a sewer connection from the subdivision which had already occurred prior to the execution of the above described written Lease Agreement.

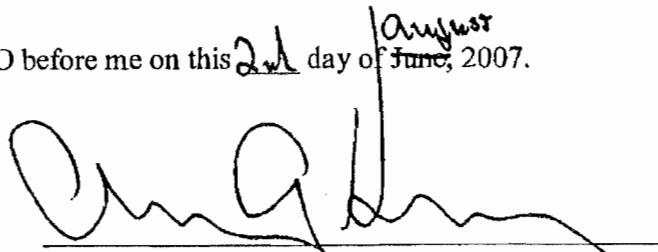
FURTHER SAITH AFFIANT NAUGHT.

Dated this 2nd day of <sup>August</sup>~~June~~, 2007.

  
LUKE BOYLE  
J&LB Properties, Inc.

SUBSCRIBED AND SWORN TO before me on this 2nd day of <sup>August</sup>~~June~~, 2007.



  
NOTARY PUBLIC FOR IDAHO  
Residing at: Idaho Falls, Idaho  
Commission expires: 12/6/2010

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Mark R. Fuller  
410 Memorial Dr, Ste 201  
PO Box 50935  
Idaho Falls, ID 83405-0935

☒ U. S. Mail  
☐ Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile

  
\_\_\_\_\_  
LANE V. ERICKSON

BONNEVILLE COUNTY

Mitchell W. Brown (ISB#: 4202)  
Lane V. Erickson (ISB#: 5979)  
RACINE, OLSON, NYE,  
BUDGE & BAILEY, CHARTERED  
P.O. Box 1391  
Pocatello, Idaho 83204-1391  
Telephone: (208)232-6101  
Fax: (208)232-6109

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

Case No. CV-06-7097

PRINCRAFT PRESS, INC. an Idaho  
corporation,

Plaintiff,

vs.

SUNNYSIDE PARK UTILITIES, INC. an  
Idaho corporation, SUNNYSIDE PARK  
OWNERS ASSOCIATION, INC., an  
Idaho corporation, and SUNNYSIDE  
INDUSTRIAL AND PROFESSIONAL  
PARK, LLC, an Idaho limited liability  
corporation,

Defendants.

**AFFIDAVIT OF LANE V. ERICKSON  
IN OPPOSITION TO  
DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT**

STATE OF IDAHO            )  
                                      : SS  
County of Bannock        )

I, Lane V. Erickson, duly sworn under oath, do hereby depose and state as follows:

1.     Affiant is of legal age, is competent to testify and testifies of the items listed below based upon his own knowledge and understanding of the facts set forth herein. Affiant is

one of the attorneys of record for PRINTCRAFT PRESS, INC., an Idaho corporation;

2. Both written discovery and depositions have been completed and are continuing in the above-captioned case. Attached hereto is a copy of portions of the Deposition Transcript of Doyle Beck.

3. The Defendants SIPP, SPU and SPOA by and through their officer and/or member Doyle Beck agree that the purpose of the Sunnyside Industrial and Professional Park is for commercial and industrial purposes. (See Deposition pg 87, lines 3-17.)

4. In 2005, the Defendant SIPP was an active Idaho limited liability company with its members being Doyle Beck and Kirk Woolf. (See Exhibit "I".)

5. In 2005, the Defendant SPU was an active Idaho corporation with its officers being Doyle Beck and Kirk Woolf. (See Exhibit "J".)

6. In 2005, the Defendant SPOA was an active Idaho corporation with its officers being Doyle Beck and Kirk Woolf. (See Exhibit "K".)

7. Prior to the construction or occupancy of the building that is occupied by Plaintiff on or about early September 2005, Travis Waters, the president of the Plaintiff, personally met with Doyle Beck and/or Kirk Woolf the officers and/or members of the Defendants SIPP, SPU and SPOA to discuss the construction of the building. In these meetings and at the request of the Defendants SIPP, SPU and/or SPOA Plaintiff provided several versions of blueprints or drawings for the building that Plaintiff would occupy. (See Deposition of Doyle Beck pg 110, lines 19-25, pg 111 lines 1-24.)

8. SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf understood that the business was owned by Travis Waters, that it was called Printcraft Press and that it was a printing business. (See Deposition of Doyle Beck pg 106, lines



22-24; pg 107, lines 15-22.)

9. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that it already had seven or eight commercial buildings connected to its septic sewer system in violation of its septic sewer system permit. (See Deposition of Doyle Beck pg 120, lines 19-25, pg 121 lines 1-7.)

10. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that its septic sewer system consisted of only one 1000 gallon tank or that the capacity of this system was only 500 gallons per day. (See Deposition of Doyle Beck pg 119, lines 2-20.)

11. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that the Third Party Utility Beneficiary Agreement or the Rules and Regulations existed or that the Defendants SIPP, SPU and SPOA were relying upon them. (See Deposition of Doyle Beck pg 309, lines 1-25, pg 310, lines 1-21.)

12. In June of 2006, despite the prohibitions provided in writing by the District Seven Health Department to the Defendants there were approximately 10 or 11 sewer connections to the sewer system operated by the Defendant Sunnyside Park Utilities, Inc. One of these sewer connections was the Plaintiff, which connection would have been made on or around September of 2005. (See Deposition of Doyle Beck pg 101, lines 22-25, pg 102 lines 1-6.)

13. In this litigation the Defendants maintain that Plaintiff was the sole cause of the failure of the sewer system. (See Deposition of Doyle Beck pg 101, lines 16-25, pg 102 lines 1-

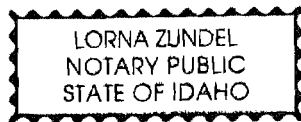
6; and pg 103 lines 9-25, pg 104 lines 1-2.)

FURTHER SAITH AFFIANT NAUGHT.

DATED this 2<sup>nd</sup> day of August, 2007.

Lane V. Erickson  
LANE V. ERICKSON  
Attorney for Plaintiff

SUBSCRIBED AND SWORN TO before me on this 2<sup>nd</sup> day of August, 2007.



Lorna Zundel  
NOTARY PUBLIC FOR IDAHO  
Residing at: Pocatello  
Commission expires: 4-10-2012

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Mark R. Fuller  
410 Memorial Dr, Ste 201  
PO Box 50935  
Idaho Falls, ID 83405-0935

☒ U. S. Mail  
☐ Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile

Lane V. Erickson  
LANE V. ERICKSON

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

PRINCRAFT PRESS, INC., an Idaho )  
corporation, )  
Plaintiff, )  
vs. ) Case No. CV-06-7097  
SUNNYSIDE PARK UTILITIES, INC., )  
an Idaho corporation, )  
Defendant. )  
\_\_\_\_\_ )

30(B)(6) DEPOSITION OF SUNNYSIDE PARK UTILITIES, INC.

TESTIMONY OF DOYLE H. BECK

May 30, 2007

REPORTED BY:

DANIEL E. WILLIAMS, CSR No. 686, RPR  
Notary Public.

1 lot 5?

2 A. As far as I know.

3 Q. Okay. All right. With regards to  
4 being a representative of Sunnyside, can you tell  
5 me what you understand CC&Rs are for?

6 A. They're to say what's allowed and  
7 what's not allowed on the lot.

8 Q. Okay. I think that's a pretty fair  
9 description.

10 Does the Exhibit No. 34, which is the  
11 second amended declaration, does it contain those  
12 types of things; it says what you can and can't  
13 do on the lots?

14 A. I think so.

15 Q. Okay. Let me refer you to page 2, and  
16 I'm looking at Roman numeral paragraph III. I  
17 just want to make sure that I understand what  
18 some of these things mean that are said within  
19 paragraph III.

20 And it appears to me to be just kind of  
21 a general statement of what the industrial park  
22 was created for. Would you agree with that?

23 A. What's -- the paragraph starts out "The  
24 general purpose and use of the lots."

25 Q. Right. And that's why I say it appears

1 to me to just kind of summarize what the  
2 industrial park was designed for.

3 Just so I understand, it wasn't  
4 designed as a residential development; is that  
5 accurate?

6 A. That's correct.

7 Q. Okay. In fact, it says within this  
8 paragraph that it will be used -- that the lots  
9 will be used for commercial and industrial  
10 purposes. Do you see that?

11 A. Yes.

12 Q. And do you agree that that's the  
13 purpose of that industrial park?

14 A. To use it for commercial and industrial  
15 purposes?

16 Q. Uh-huh.

17 A. Yeah.

18 Q. Okay. Now, it gets a little more  
19 specific in the next sentence. It says that the  
20 lots will be used for a mixture of businesses,  
21 warehouses, craft shops, and manufacturing and  
22 industrial enterprises. What do you mean by --  
23 or what does Sunnyside mean by "manufacturing and  
24 industrial enterprises"?

25 A. Well, ProWay Manufacturing & Repair was

1 a part of this, and we built crushers and hot  
2 plants and we fabricated equipment.

3 Q. Okay.

4 A. I mean, there's a variety of different  
5 things in the industrial park already with a  
6 manufacturing process.

7 Q. Okay. So I understand that what's in  
8 there. I guess, what I want to understand is  
9 what was intended when it said manufacturing and  
10 industrial enterprises, and I think you've kind  
11 of answered that for me.

12 It can be fabrication; it could be, you  
13 know, creation; it could be manufacturing; those  
14 kinds of things. Is that accurate?

15 A. Yeah.

16 Q. Okay. Down at the very bottom -- you  
17 know, again, it's hard for me to show you exactly  
18 where. It's in the sentence that begins "It is  
19 the intent," but it's down -- the last two lines  
20 is really what I'm looking at, I guess, where it  
21 says "nuisance industries or other use which  
22 would discourage the use of the development area  
23 for anything other than commercial or industrial  
24 use."

25 What's meant by nuisance industry, to

1 the best of your knowledge?

2 MR. FULLER: Objection. Calls for a  
3 legal conclusion.

4 Q. (BY MR. ERICKSON) I'm just trying to  
5 understand what this term means with regards to  
6 this restriction.

7 MR. FULLER: Same objection.

8 THE WITNESS: Nuisance industry might  
9 be like a fat rendering plant.

10 Q. (BY MR. ERICKSON) Okay.

11 A. Something that would put off a noxious  
12 odor or noise.

13 Q. Okay.

14 A. Something that you wouldn't want to put  
15 your business by.

16 Q. Okay. Again, right above that it says  
17 that it's discouraged that these will be used for  
18 dwellings. So there's no -- are there any  
19 dwellings in there right now, residential  
20 dwellings?

21 A. The -- a nuisance industry might even  
22 be an Anheuser-Busch.

23 Q. Okay. I appreciate that.

24 A. Rail cars clanking and steam and maybe  
25 even some odors.

1 to Printcraft when they asked for copies of the  
2 agreements.

3 Q. (BY MR. ERICKSON) Oh, you mean in  
4 September, when we asked for those copies?

5 A. Yes.

6 Q. All right. I'll just represent to you  
7 that I don't have a copy of that in any of these  
8 documents here, but I will search for those.

9 But as best you understand, there was  
10 some meeting of the board, and there was minutes  
11 that record a change in the rates?

12 A. Yes.

13 MR. FULLER: I think an additional copy  
14 has also been provided in response to discovery.

15 MR. ERICKSON: Okay.

16 MR. FULLER: I'll check and get you the  
17 exact numbers.

18 MR. ERICKSON: Well, I -- was it then  
19 attached to the third party agreement as a new  
20 schedule?

21 MR. FULLER: No.

22 MR. ERICKSON: No.

23 THE WITNESS: It was when I sent it to  
24 the Travis in September.

25 Q. (BY MR. ERICKSON) It was attached to

1 actually contains paragraph 15. And then it  
2 appears to me that Count III, at paragraph 20,  
3 also incorporates the allegations that are made  
4 in paragraph 15. Does that make sense?

5 A. Okay.

6 Q. All right. And I'll ask you some  
7 questions about some of these things.

8 It appears to me in Count I, which is  
9 on page 10, that Sunnyside is making a claim for  
10 what appears to be \$44,908.51. Do you see that?

11 A. Okay.

12 Q. And I've read through the allegations  
13 in paragraph 7 and paragraph 8. It appears to me  
14 that Sunnyside is saying that these expenses or  
15 these moneys, damages, were incurred directly and  
16 proximately because of the actions taken by  
17 Printcraft; is that accurate?

18 A. That's correct.

19 Q. It's Sunnyside's position that each and  
20 every one of these expenses was caused by  
21 Printcraft?

22 A. Yes.

23 Q. There was no other cause?

24 A. That's correct.

25 Q. In paragraph 7 -- well, in Count I,

1 the copy that you sent to Travis in September?

2 A. Yes.

3 Q. Okay. Well, I'll search around for  
4 that. I'm certain I probably have it.

5 Let me have you turn to page 10 now of  
6 Exhibit No. 31. I'll just represent to you, just  
7 summarizing, that it appears to me that pages 10  
8 through 17 are the counterclaim counts or causes  
9 of action that were raised by Sunnyside. And I  
10 just want to ask you some questions about those.

11 And again, I'm not trying to trick you.  
12 I just want to make sure that I understand all of  
13 this.

14 There appear to be -- there appear to  
15 be four counts or causes of action raised by  
16 Sunnyside in its counterclaim. Would you agree  
17 with that?

18 A. I'm not sure what a cause of action is.

19 Q. I'll just represent to you that they  
20 are the counts that are listed in bold.

21 A. It looks like there's four of them  
22 listed.

23 Q. Okay. In paragraph 7, on page 10, it  
24 refers to paragraph 15. That's for Count I. In  
25 Count II, which begins on page 11 -- Count II

1 which is what we're taking on page 10, which  
2 covers paragraph 7 and paragraph 8, it appears to  
3 me, it appears to be for breach of contract. And  
4 it refers to the third party agreement that we've  
5 been talking about.

6 Essentially, as I understand it,  
7 Sunnyside is claiming that Printcraft breached  
8 this agreement by its actions and conduct?

9 A. Okay.

10 Q. Is that accurate?

11 A. Yes.

12 Q. Okay. In paragraph 7 it talks about  
13 Sunnyside suffering a temporary failure during  
14 June of 2006. Do you see that there?

15 A. Yes.

16 Q. Okay. Is it Sunnyside's position that  
17 that temporary failure was solely caused by  
18 Printcraft?

19 A. Yes.

20 Q. There was no other reason?

21 A. That's correct.

22 Q. Okay. Can you tell me how many  
23 connections there were to the system in June of  
24 2006?

25 A. I don't have that with me.

1 Q. Okay.

2 A. I think there was 10 or 11, but I'd  
3 have to add them up.

4 Q. And Printcraft would have been one of  
5 these 10 or 11?

6 A. Yes.

7 Q. Okay. Again, this paragraph  
8 incorporates paragraph 15, which has a number of  
9 subparagraphs. It actually goes for about two  
10 pages, I would say.

11 Let me have you just brush through  
12 those real quick, if you don't mind. Just kind  
13 of familiarize yourself with them.

14 A. Okay.

15 Q. Okay. As I understand it, what's being  
16 set forth in paragraph 15, which has  
17 subparagraphs (a) through (l), are statements  
18 that are made by Sunnyside saying this is what  
19 Printcraft did that caused the failure; is that  
20 accurate?

21 A. Pretty much.

22 Q. Okay. And I understand that you've  
23 done some additional discovery and that your  
24 responses to our discovery requests may supply  
25 additional information in addition to what we see

1 here.

2 But the last sentence in paragraph 7 I  
3 want to ask you about. It says that this  
4 temporary failure resulted in an investigation by  
5 the District Seven Health Department and the  
6 issuance of a notice of violation and certificate  
7 of disapproval to Sunnyside; is that accurate?

8 A. Yes.

9 Q. There was no other causes or reasons  
10 that this notice of violation and certificate of  
11 disapproval to Sunnyside was issued?

12 A. That's correct. This notice of  
13 violation was issued because of the failure of  
14 the system.

15 Q. Okay.

16 A. Without the failure, we were only  
17 dealing with expansion of the system. And it  
18 converted it to dealing with a failure of the  
19 system.

20 Q. Okay. And again, Sunnyside's position  
21 is that Printcraft was the sole cause?

22 A. Absolutely the sole cause.

23 Q. Even though there were 10 or 11  
24 connections total onto the system at that  
25 particular time?

1 A. Even though there were 10 or 11  
2 connections, that's correct.

3 Q. Okay. I just want to make sure I  
4 understand what the position is.

5 Is it Sunnyside's position, then, that  
6 it was in full compliance with any applicable  
7 laws or regulations with regards to that system  
8 at the time that this temporary failure occurred?

9 A. Well, not at the time that it occurred.  
10 We were in violation because of Printcraft Press.

11 Q. Okay. Well, let's back up.

12 A. But prior to Printcraft Press, yes, we  
13 were in compliance.

14 Q. The day before this temporary failure  
15 occurred, it's Sunnyside's position that they  
16 were in full compliance?

17 A. No, four or five months before. The  
18 day that the -- that Printcraft Press started  
19 using -- the day before Printcraft Press started  
20 using the facility, we were in full compliance.

21 Q. Okay. So the very day that Printcraft  
22 is hooked up and actually starts discharging into  
23 the system is the day that Sunnyside alleges that  
24 they were no longer in compliance?

25 A. The day that they chose to lie, deny,

1 and dump is what put us in violation and caused  
2 our failure.

3 Q. Okay. And let's be specific about  
4 that, Mr. Beck. What day was that? When did  
5 that occur?

6 A. Well, we don't know. I mean, when they  
7 started business, they represented to us that  
8 they had 30 employees for sanitary sewer purposes  
9 only.

10 Q. Okay. And who made that  
11 representation?

12 A. Travis Waters did.

13 Q. Was it made -- was that representation  
14 made in response to a request or a statement from  
15 you?

16 A. That was made at the time of the CC&R  
17 drawing interview. I asked him what their uses  
18 and needs was going to be for sewer, and he told  
19 me 30 employees for sanitary purposes only.

20 Q. I want to make sure that I understand  
21 that too. Is that how it was phrased, "What are  
22 your sewer services needs going to be?"

23 A. I said, "What are your needs for sewer  
24 service going to be?"

25 Q. Okay.

1 A. And he said, "We should have 30  
2 employees, and that's all we'll need it for."  
3 Q. You never asked him how many employees  
4 that he had; he volunteered that to you?  
5 A. Yes. He said he would need services  
6 for 30 employees.  
7 Q. Did you make any other inquiries other  
8 than that time?  
9 A. Well, my inquiry was -- he said he  
10 needed it for 30 employees, and my inquiry was,  
11 "For sanitary purposes only?" And he said,  
12 "Yes."  
13 Q. Okay. It's your position that you were  
14 very specific about what that term "sanitary  
15 purposes only" was?  
16 A. Sanitary purposes for those 30  
17 employees, yes.  
18 Q. Do you recall approximately when this  
19 happened, this conversation that you're talking  
20 about?  
21 A. No.  
22 Q. Did you know what type of business  
23 Mr. Waters operated?  
24 A. Yes. I knew that he printed.  
25 Q. Did you ask him any specific questions

1 system.  
2 Q. This failure that you mentioned in  
3 paragraph No. 7 in this counterclaim, this  
4 temporary failure, you state that it resulted in  
5 an investigation by District Seven. Do you know  
6 when this investigation began?  
7 A. It began the day that we went into  
8 their office and told them that we had a problem.  
9 Q. Do you remember approximately what day  
10 that was?  
11 A. No.  
12 Q. I know that some of the documentation  
13 that we'll go through refers to it being in June  
14 of 2006; does that sound accurate?  
15 A. Yes.  
16 Q. Do you -- well --  
17 MR. FULLER: Counsel, the paragraph  
18 you're referring specifically refers to June  
19 2006.  
20 MR. ERICKSON: Oh, yes, it does.  
21 You're exactly right.  
22 Q. (BY MR. ERICKSON) How was that  
23 investigation started by the district? What did  
24 they do?  
25 A. I don't know what you mean.

1 about his business?  
2 A. No.  
3 Q. Why not?  
4 A. Well, because he answered my questions.  
5 What more could I ask him?  
6 Q. It seems to me that there's quite a few  
7 questions that you might be able to ask him. But  
8 it's your opinion or your testimony that you  
9 didn't ask him anything further?  
10 A. Once he satisfied my concerns that his  
11 purposes was for his employees or for sanitary  
12 reasons, there's no more questions to ask. What  
13 more could I ask other than the needs for the  
14 people?  
15 Q. Did you inquire about the processes  
16 that he used in his business?  
17 A. I didn't know that he had any  
18 processes.  
19 Q. But as you sit here today, you did know  
20 what business he operated. You knew it was  
21 Printcraft Press business?  
22 A. That's correct. But I also know that  
23 Anheuser-Busch processes barley, but unless they  
24 tell me, I don't know that they're going to be  
25 putting a million gallons a day into a sewer

1 Q. Did they come to you? Did they call  
2 you on the phone? I just want to know what  
3 process --  
4 A. Well, we went to them.  
5 Q. Okay. And reported --  
6 A. And told them that we a had problem.  
7 Q. Okay.  
8 A. They came out and looked at it and then  
9 wanted to know what we were going to do for a  
10 solution.  
11 Q. Who came out?  
12 A. I think Kellye Eager, but I'm not sure.  
13 Q. Was a report generated or any  
14 documentation that you can remember?  
15 A. Photographs, I've seen.  
16 Q. Okay. And we'll be getting to those in  
17 a few minutes.  
18 Can you recall anything else about the  
19 investigation itself, about what occurred?  
20 A. (Witness shook head.)  
21 Q. When Kellye was down there looking at  
22 this, did you go down there with her?  
23 A. No.  
24 Q. Did any other representative of  
25 Sunnyside go down there with her?

1 A. No.  
 2 Q. After she went down to where this  
 3 failure had occurred, did she then come back up  
 4 and talk with you specifically?  
 5 A. Not that I remember.  
 6 Q. Do you recall if she talked to any  
 7 other representative of Sunnyside?  
 8 A. I don't know.  
 9 MR. ERICKSON: Do you mind if we just  
 10 take a quick break?  
 11 MR. FULLER: That's fine.  
 12 MR. ERICKSON: Let's do that just real  
 13 quick.  
 14 (A brief recess was taken.)  
 15 Q. (BY MR. ERICKSON) I actually opened  
 16 this book up, Mr. Beck, up to what we have  
 17 already marked as Exhibit No. 7, if you wouldn't  
 18 mind just taking a quick look at that.  
 19 Your paragraph 15 talks about -- in one  
 20 of the subparagraphs, I forget which it is, it  
 21 essentially talks about the fact -- and you've  
 22 already testified about the fact that you  
 23 received some drawings from Mr. Waters, who  
 24 presented them to you so that they could be, I  
 25 guess, approved pursuant to the CC&Rs; is that

1 accurate?  
 2 A. There was a couple of different sets  
 3 submitted, yes.  
 4 Q. Okay. What's been marked as Exhibit  
 5 No. 7, is that the set that you received from  
 6 Mr. Waters?  
 7 A. I don't know if it's the set I received  
 8 or if it's the set Kirk Woolf received.  
 9 Q. But Sunnyside received it, I guess, is  
 10 what I'm saying.  
 11 A. Yeah.  
 12 Q. Okay. The reason why I ask is because  
 13 in our discovery responses we asked for a copy of  
 14 any and all drawings, blueprints, and the like,  
 15 and there weren't any. Actually, I didn't even  
 16 see this one in there.  
 17 I just wondered if there were any  
 18 others that you were aware of, other than what's  
 19 been marked as Exhibit 7?  
 20 A. Well, there's the set I got, there's a  
 21 set Kirk got, and then there's a previous set of  
 22 a different type of structure that we got --  
 23 Q. Okay.  
 24 A. -- that we used in Travis's deposition.  
 25 Q. Okay.

1 A. That's the only ones I'm aware of.  
 2 MR. ERICKSON: Counsel, remind me, are  
 3 those included in here? I didn't see them.  
 4 MR. FULLER: Yeah, there are documents  
 5 included in different exhibits and whatnot.  
 6 Let's go off the record for just a  
 7 minute.  
 8 (A discussion was held off the record.)  
 9 MR. ERICKSON: All right. Back on the  
 10 record.  
 11 For the record, we just went through a  
 12 couple of the exhibits that we've already  
 13 discussed. And as I understand, Mr. Fuller, you  
 14 plan on looking through your documents and seeing  
 15 if there are any other copies.  
 16 Both you and I recall looking at some  
 17 copies at a separate deposition, and it just  
 18 doesn't appear that I have a copy of those.  
 19 Q. (BY MR. ERICKSON) But just to follow  
 20 up, then, Mr. Beck, to the best of your  
 21 understanding, there was a preliminary set of  
 22 documents that were provided to you, and then  
 23 what's been marked as Exhibit No. 7 was also  
 24 provided to you? And when I say "you," I mean  
 25 Sunnyside.

1 A. Yes.  
 2 Q. Okay. If you could turn to page 11 in  
 3 Exhibit No. 31, this is still part of  
 4 paragraph 8, which lists the damages,  
 5 specifically, that Sunnyside is claiming.  
 6 The last sentence, it's about five  
 7 lines, five or six lines long. It starts with,  
 8 "In the event." It says "In the event Sunnyside  
 9 is required to annex to the City of Idaho Falls,  
 10 or to construct a large soil absorption system,  
 11 and/or to abandon its current system, as a result  
 12 of the acts of plaintiff, Sunnyside will also  
 13 seek as damages the costs of such construction,  
 14 annexation, and/or abandonment, in an amount to  
 15 be proven at trial."  
 16 Is it Sunnyside's position that if  
 17 they're required to do any of these three things  
 18 that we just listed that that would have been  
 19 caused by plaintiff?  
 20 A. Yes.  
 21 Q. And that plaintiff was the sole cause  
 22 for that?  
 23 A. That's correct.  
 24 Q. There were no other reasons or causes?  
 25 A. Because we're dealing with a failure,



1 confirm that on the drawing. And in our copy, my  
2 copy -- and so this may be my copy -- I didn't  
3 have that drawing.

4 Q. Does Mr. Woolf have a copy that has  
5 that second floor drawing on it?

6 A. I don't know. I don't know if he had a  
7 drawing or if he just had the representation from  
8 Mr. Waters. He's the one that told -- that's  
9 told me or told us --

10 Q. Now, I thought you just said a minute  
11 ago that Mr. Woolf had a copy that had this.

12 A. Oh, I think that he did, but I don't  
13 know for sure. I've never seen it. And I only  
14 think that because that's what he took from his  
15 review of the drawings, is that it would be used  
16 for storage. And I don't know if he got that  
17 from the drawing or if he got it from Mr. Waters.

18 Q. Have you ever asked Mr. Woolf to look  
19 for that, his copy?

20 A. Yes, I think so.

21 Q. Did he provide anything to you, or to  
22 Sunnyside, to Mr. Fuller?

23 A. I don't know. If I recall right, I  
24 believe it was in Travis's deposition that he  
25 alleged there was another drawing. Now, whether

1 or not Kirk had that, I don't know.

2 Q. Okay. In talking with Mr. Waters --  
3 and this is your specific conversations with him  
4 that you referred to you when he provided the  
5 drawing to you and so forth -- did you ever  
6 represent or explain to Mr. Waters what the size  
7 of the system was that Sunnyside was providing to  
8 its occupants?

9 A. No. I just calculated in my mind the  
10 number of people that he said he would be using  
11 compared to our capacity and knew that we were  
12 sufficient.

13 Q. What was your capacity at that time?

14 A. 500 gallons a day.

15 Q. But you don't recall saying to  
16 Mr. Waters that the capacity was 500 gallons a  
17 day?

18 A. You mean for the entire system?

19 Q. Right.

20 A. No, I didn't.

21 Q. Did Mr. Waters ever ask you about that?

22 A. No.

23 Q. Do you recall approximately when it  
24 was, what date it was, that Printcraft made its  
25 connection to the sewer system?

1 A. No, I don't. I mean, are you talking  
2 about when they started using it or when they  
3 physically made the connection?

4 Q. Let's talk about when they started  
5 using it. Are you aware of approximately when  
6 that occurred?

7 A. No. I think it's sometime in March,  
8 April.

9 Q. Of 2006?

10 A. Yes, but I'm not positive.

11 Q. Before Printcraft began using the  
12 system -- well, let me back up.

13 I think you mentioned that in June of  
14 2006 there were 10 or 11 connections to this  
15 system; is that accurate?

16 A. Well, there again, there -- no, it's  
17 not accurate.

18 Q. Okay.

19 A. I said it was approximate. And there's  
20 also a definition that needs to be defined here  
21 when you talk about whether it's a connection  
22 that pays for a service or whether it's a  
23 structure that's connected to it.

24 Q. Okay.

25 A. And there was one, two -- I think seven

1 or eight structures.

2 Q. Prior to Printcraft's structure?

3 A. That's correct.

4 Q. And of those seven and eight  
5 structures, there would have been a total of  
6 around ten occupants; is that fair to say?

7 A. No, multiple, more than that.

8 Q. There would be more than that.

9 Okay. How many do you think there  
10 were?

11 A. Did we provide them with the --

12 Q. And I'm not going -- I'm not going to  
13 hold you to it. I just want to know  
14 approximately. And I've got other documents I'm  
15 going to go through where you'll have a chance to  
16 clarify.

17 I'm just trying to understand, at the  
18 time that Printcraft was hooked up, how many  
19 others were hooked up at that time?

20 A. I'd have -- I can't really give you --

21 I mean, have the employee count, and it's  
22 something that I think we furnished you.

23 Q. Uh-huh. Okay. But that's accurate --

24 A. Yes.

25 Q. -- as to how many -- I want to keep

1 there or even if we did, but a number of them --  
2 how do you determine what the design system of a  
3 park like that should be?

4 A. Well --

5 Q. Do you simply do it based on how many  
6 occupants you have at the time the development  
7 occurs?

8 A. No.

9 Q. How do you do it?

10 A. The only way that you can do it is you  
11 base it on -- because, see, there's so many  
12 variables. I mean, you could have, say, 20  
13 buildings with one guy in each building.

14 Q. Sure.

15 A. 20 guys. But if you have 20 guys in  
16 each building, now you've got, what, 40 -- or  
17 400. You've got 400. So you don't know what's  
18 going to be in each building.

19 Q. And so that's my question. How do you,  
20 then -- based on that, when you're a developer,  
21 how do you know how to comply with the IDAPA  
22 regulations in your design?

23 A. The only way that you can -- well, the  
24 way we did, the only way I know of, is that you  
25 start small and then you expand. And you can

1 expand -- according to the regulations, you can  
2 expand up to 2,500 gallons.

3 Once you get to 2,500 gallons, then you  
4 either need to hook to a city system or do an  
5 LSAS or do a -- it's really referred to a third  
6 party system, some kind of a waste processor.  
7 You can do any one of those three once you get  
8 there. But if you don't get there, you don't do  
9 any of those.

10 But that's -- I mean, that's part of  
11 the reason that, obviously, we have to have rules  
12 and regulations; okay? I mean, we can't -- we  
13 have a system that can only do -- I mean, until  
14 2006, it could only do 500 gallons a day. Well,  
15 obviously, we can't take on some lot owner that  
16 wants to dump us 10,000 gallons a day. But we  
17 know that employees don't do that. That only  
18 comes in an industrial process-type environment.

19 So that's what we did from the very  
20 beginning is we excluded industrial process  
21 waste. We just -- we can't accept that. I mean,  
22 if they're willing to pay for it, but it's not --  
23 I mean, our system is not designed for it, we  
24 don't allow for it, we can't accept it.

25 Because, see -- and this is part of

1 what I think is the big misunderstanding is we  
2 have those rules and regulations for very good  
3 reasons. Number one, what if everybody decided  
4 to do a process waste? How are we going to  
5 handle that?

6 Q. How would do you know?

7 A. Well, because our regulations prohibit  
8 it. We don't allow anyone to hook onto our  
9 system and dump process waste in it, because we  
10 have no other choice. We don't have the capacity  
11 to take everyone doing 10,000 gallons a day,  
12 20 buildings doing -- I mean, it's just  
13 impossible. There's no way to do that, so we  
14 have to exclude it.

15 And that's why -- I think one of the  
16 things that's very misunderstood is that even if  
17 we had an LSAS, we'd still be sitting here today  
18 with this same argument. What our system is down  
19 there is -- it totally makes no difference. We  
20 will handle that end.

21 What's important is that we follow the  
22 regulations. But we put up regulations so that  
23 we're not going to have 20 businesses dumping  
24 10,000 gallons a day on us. We just couldn't do  
25 that.

1 Q. So what you're saying, then, is that  
2 Sunnyside contends that they complied with IDAPA  
3 regulations by putting in the system that was put  
4 in with the intention to expand it, as you've  
5 discussed at length in some of your testimony  
6 already?

7 A. That's correct.

8 Q. In order to meet any future needs that  
9 might exist?

10 A. With the restriction on all applicants  
11 that we take no process waste.

12 Q. Do you have a written application that  
13 sets that out?

14 A. No.

15 Q. Any letters or any other documents that  
16 you send out to prospective buyers?

17 A. Well, we just tell them in the  
18 beginning. I mean, that's --

19 Q. Do you send them a copy of your rules  
20 and regulations before they buy a lot?

21 A. If they want it, you bet.

22 Q. Well, I'm not asking about whether  
23 they want it. I would assume that most people  
24 wouldn't know that they exist, Mr. Beck; wouldn't  
25 you agree with that?

1 A. You say wouldn't know?

2 Q. Would not know.

3 A. Well, they may not. But I'll tell you  
4 this: There's no one that's disposing of process  
5 water that doesn't know where it's going to go  
6 before they hook on. I mean, that's -- you know,  
7 that's almost like you can't drive without a  
8 driver's license.

9 If you don't know where your chemicals  
10 or your high volumes of water are going to go,  
11 you can't hook onto it. You can't even build  
12 your own system without identifying that to the  
13 health department or whoever you're giving those  
14 materials to.

15 Q. So there is no documentation of any  
16 sort whatsoever that's provided to a potential  
17 occupant of the park?

18 A. Well, the documentation is, you know,  
19 we're selling the lots and we don't sell to  
20 someone who has a demand for process water or  
21 high volume employees.

22 Just like Corporate Express, they said,  
23 "We've got 200 employees." We said, "Sorry."  
24 First they said, "Well, we'll annex to the city."  
25 We said, "Good luck. We've been that route."

1 Then they came back and say, "Well, we're just  
2 going to put in our own system." Fine with us.  
3 You can put in your own system.

4 We can't take process water. We're  
5 never going to take process water. Even if we  
6 put in an LSAS, we're only going to take sewer.

7 Q. Is it your testimony, then, Mr. Beck,  
8 that Exhibit No. 62 is accurate as of today with  
9 regards to page no. 2?

10 A. Yes.

11 Q. And it was accurate for the dates  
12 listed on page 1 for page No. 1?

13 A. Yes.

14 Q. When you were talking with Corporate  
15 Express about them coming into the building -- or  
16 into the park and creating this building, did  
17 they express to you that they had any sort of  
18 waste, other than human waste, that was going to  
19 be put into the sewer system?

20 A. They said they had only human waste.

21 Q. And that would be for the -- I can't  
22 remember what you said -- about 300 employees?

23 A. I think they calculated 2,700 gallons.  
24 I can't remember -- or 1,700. I don't remember  
25 what it was. I'd have to look it up. But, yeah,

1 they had a lot of employees, a lot more than what  
2 we wanted to deal with. And theirs was just  
3 sewer.

4 Q. Let's turn to page No. 22 in  
5 Exhibit 37.

6 A. (Witness complied.)

7 Q. And I'm looking specifically at  
8 Response to Interrogatory No. 18, which Sunnyside  
9 states: "When connected to the system,  
10 Printcraft was entitled to discharge all of its  
11 sewage," in quotation marks, "as defined by the  
12 rules and regulations but no other substances."

13 Earlier in your testimony, you saw that  
14 IDAPA also has a definition for sewage. You  
15 don't rely upon the IDAPA definition for sewage  
16 with regards to this response; is that accurate?

17 A. Absolutely not.

18 Q. You rely upon only the definition as  
19 provided in Sunnyside's own rules and  
20 regulations?

21 A. That's correct. We don't have the  
22 capacity to take care of the IDAPA definition.  
23 We've never had that capacity.

24 Q. It's a good sign when you see me  
25 flipping pages. That means that you've already

1 answered a lot of the questions that I was going  
2 to ask.

3 So let me have you turn to page 26.  
4 I'm looking specifically at Interrogatory No. 22  
5 and the response provided by Sunnyside, which  
6 identifies an FL16 Flow Logger, Global Water  
7 Instruments, Incorporated. Do you see that?

8 A. Yes.

9 Q. Can you tell me when it was that  
10 Sunnyside began using this device?

11 A. A couple months ago.

12 Q. Sometime in 2007?

13 A. I gave you the report.

14 Q. Okay. This report that's identified as  
15 Exhibit No. 63 is a report that you generated off  
16 of the information you obtained from this  
17 instrument --

18 A. Yes.

19 Q. -- or device?

20 Okay. Why don't you identify for me  
21 what Exhibit 63 is.

22 A. 63 is a daily listing of the gallons  
23 used per day and a weekly average and a total  
24 average, beginning on the day that we had a final  
25 calibration done, which would have been the 6th

No. <b>W 2308</b>	<b>Due no later than April 30, 2005</b>		<b>2 Registered Agent and Office NO PO BOX</b>													
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080  <b>NO FILING FEE IF RECEIVED BY DUE DATE</b>	<b>1 Mailing Address</b> <small>Correct in this box if applicable</small>  SUNNYSIDE INDUSTRIAL AND PROFESSION KIRK WOOLF 3821 PROFESSIONAL WAY #17 IDAHO FALLS, ID 83402		KIRK WOOLF 3821 PROFESSIONAL WAY #17 IDAHO FALLS, ID 83402  <b>3. New Registered Agent Signature</b>													
<b>4. Limited Liability Companies: Enter Names and Addresses of Managers.</b> <table border="1"> <thead> <tr> <th>Office held</th> <th>Name</th> <th>Street or P.O. Address</th> <th>City</th> <th>State</th> <th>Zip</th> </tr> </thead> <tbody> <tr> <td>Manager</td> <td>Kirk Woolf</td> <td>3821 Professional Way #17</td> <td>IF</td> <td>ID</td> <td>83402</td> </tr> </tbody> </table>					Office held	Name	Street or P.O. Address	City	State	Zip	Manager	Kirk Woolf	3821 Professional Way #17	IF	ID	83402
Office held	Name	Street or P.O. Address	City	State	Zip											
Manager	Kirk Woolf	3821 Professional Way #17	IF	ID	83402											
<b>5. Organized Under the Laws of:</b>  IDAHO W 2308		<b>6.</b> Signature <u><i>Kirk Woolf</i></u> Date <u>5/3/05</u> Name <u>Kirk Woolf</u> Title <u>Manager</u>														

Issued 02/01/2005

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No. C 143217

Due no later than March 31, 2005  
Annual Report Form

2. Registered Agent and Office NO PO BOX

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SECRETARY OF STATE  
700 WEST JEFFERSON  
PO BOX 83720  
BOISE, ID 83720-0080

1. Mailing Address - Correct in this box, if applicable

SUNNYSIDE PARK UTILITIES, INC.  
3655 PROFESSIONAL WAY  
IDAHO FALLS, ID 83401

MARK R FULLER  
410 MEMORIAL DR  
SUITE 201  
IDAHO FALLS, ID 83402

NO FILING FEE IF  
RECEIVED BY DUE DATE

3. New Registered Agent Signature

4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.

Office held	Name	Street or P O Address	City	State	Zip
President	Kirk Woolf	3655 Professional Way	Idaho Falls	Idaho	83402
Sec/Treasurer	Doyle Beck	3655 Professional Way	Idaho Falls	Idaho	83402

5. Organized Under the Laws of:

IDAHO  
C 143217

6.

Signature

Name (typed or  
Printed)

Doyle H. Beck

Date

Jan 27, 2005

Title

Sec/Treasurer

Issued 01/03/2005

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EXHIBIT  
"J"

No. C 143218

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Annual Report Form

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700 WEST JEFFERSON  
PO BOX 83720  
BOISE, ID 83720-0080

1. Mailing Address. Correct in this box, if applicable.

SUNNYSIDE PARK OWNERS ASSOCIATION,  
3655 PROFESSIONAL WAY  
IDAHO FALLS, ID 83401

MARK R FULLER  
410 MEMORIAL DR  
SUITE 201  
IDAHO FALLS, ID 83402

NO FILING FEE IF  
RECEIVED BY DUE DATE

3. New Registered Agent Signature

4.

Corporations: Enter Names and Business Addresses of President, Secretary and Directors.

Office held	Name	Street or P.O. Address	City	State	Zip
President	Kirk Woolf	3655 Professional Way	Idaho Falls	Idaho	83402
Sec/Treas	Doyle H. Beck	3655 Professional Way	Idaho Falls	Idaho	83402

5. Organized Under the Laws of:

IDAHO  
C 143218

6.

Signature

Doyle H. Beck

Date

Sec/Treasurer

Name (Typed or Printed)

Title

Issued 01/03/2005

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Mitchell W. Brown (ISB#: 4202)  
Lane V. Erickson (ISB#: 5979)  
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Telephone: (208)232-6101  
Fax: (208)232-6109

7 AUG -2 P4:26

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

PRINCRAFT PRESS, INC., an Idaho  
corporation,

Plaintiff,

vs.

SUNNYSIDE PARK UTILITIES, INC., an  
Idaho corporation, SUNNYSIDE PARK  
OWNERS ASSOCIATION, INC., an  
Idaho corporation, and SUNNYSIDE  
INDUSTRIAL AND PROFESSIONAL  
PARK, LLC, an Idaho limited liability  
corporation,

Defendants.

Case No. CV-06-7097

**PLAINTIFF'S MEMORANDUM  
IN RESPONSE TO  
DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT**

COMES NOW the Plaintiff PRINCRAFT PRESS, INC., an Idaho corporation,  
(hereafter "Plaintiff") by and through its attorneys of record and hereby submits its  
Memorandum in Response to the Motions for Summary Judgment filed separately by the  
Defendants SUNNYSIDE PARK UTILITIES, INC., an Idaho corporation, SUNNYSIDE PARK

OWNERS ASSOCIATION, INC., an Idaho corporation, and SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK, LLC, an Idaho limited liability company. The factual grounds and bases which support the Court's denying summary judgment in favor of any of the above-captioned Defendants are supported by the Affidavits which are already on record before the Court as well as the Affidavits of Lane V. Erickson, and Travis Waters (Printcraft Press) filed herewith in Opposition to Summary Judgment.

### **RELIEF SOUGHT**

The Defendants in the above captioned proceedings each separately filed a Motion for Summary Judgment seeking an order of the Court dismissing each and every allegation and cause of action brought by Plaintiff in its Verified Complaint against the Defendants. Based upon the facts of this case, and the applicable law Plaintiff seeks an order from the Court denying each of the Defendants' Motions for Summary Judgment.

### **PARTIES**

1. The Plaintiff PRINTCRAFT PRESS, INC., (hereafter "Plaintiff" or "Printcraft") is and was at all times material herein an Idaho Corporation with its primary place of business in Bonneville County, Idaho. Printcraft employs approximately forty employees and operates a commercial full color printing service.

3. The Defendant SUNNYSIDE PARK UTILITIES, INC., (hereafter "Defendant SPU"), is and was at all time material herein an Idaho corporation with its primary place of business in Bonneville County, Idaho.

4. The Defendant SUNNYSIDE PARK OWNERS ASSOCIATION, INC., (hereafter "Defendant SPOA"), is and was at all time material herein an Idaho corporation with



its primary place of business in Bonneville County, Idaho.

5. The Defendant SUNNYSIDE INDUSTRIAL AND PROFESSIONAL PARK, LLC, (hereafter "Defendant SIPP"), is and was at all time material herein an Idaho limited liability corporation, with its primary place of business in Bonneville County, Idaho.

### **FACTS AND BACKGROUND**

The following facts which are supported on the record before the Court and by the affidavits filed herewith, are material and create genuine issues of material fact which supports the Court's denying the separate Motions for Summary Judgment filed by each of the Defendants.

6. On or about August 15, 1996, Defendant SIPP completed and filed with the District Seven Health Department a septic sewer system permit for the installation of a septic sewer system. The septic sewer system permit included numerous pages from the Defendant SIPP describing the use of the system and provided drawings and details of the location of the system and its expected use. The septic sewer system permit states on its face that it is for only "1 or 2 commercial office buildings." (See Affidavit of Travis Waters in Opposition to Summary Judgment (hereafter "Water's Affidavit") Exhibit "A".)

7. On or about August 23, 1996, the District Seven Health Department physically inspected the septic system and tank that was installed by the Defendant SIPP. In its Septic System Inspection Report, the District Seven Health Department included a drawing of the actual system that was installed together with information indicating that a 1,000 gallon tank had been installed rather than the 750 gallon tank listed in the original application described more fully above. The Septic System Inspection Report also indicates that the tank needed to be "cleaned

every three to five years.” (See Water’s Affidavit as Exhibit “B”).)

8. On or about August 4, 1999, the Defendant SIPP, by and through its member, Kirk Woolf, executed a Development Agreement wherein it agreed with Bonneville County that it would develop the tract of land described therein and would provide all street improvements and utilities as were necessary to be completed within this subdivision in the interest of the health, welfare, and/or safety of the inhabitants of the county. This Development Agreement was recorded on August 4, 1999 as Bonneville County Recorder’s Instrument No. 1003567. (See Water’s Affidavit as Exhibit “C”).)

9. A plat map was prepared by a surveyor, David E. Benton, for and in behalf of Defendant SIPP, indicating the roads and the sewer lines complete with manhole accesses on or about July 30, 1999. Pursuant to all state and local rules, laws, regulations, and zoning ordinances, the above-described plat received the proper acknowledgements from the County, the surveyor and all applicable parties on or about July 30, 1999. Said plat map was then recorded on August 4, 1999 as Bonneville County Recorder’s Instrument No. 1003568. (See Water’s Affidavit as Exhibit “D”).)

10. On or about August or September 1996, the Defendant SIPP installed the septic sewer system described and set forth in Exhibits “A”, “B”, “C” and “D”. See Affidavit of Lane V. Erickson in Opposition to Summary Judgment, (hereafter Erickson Affidavit”).

11. On or about March 29, 2002, the Defendant SPU was formed by Kirk Woolf and Doyle Beck. (See Waters Affidavit Exhibit “E”).)

12. Additionally, on March 29, 2002, a meeting was held by and between Kirk Woolf and Doyle Beck on behalf of SIPP, Benton Engineering, representatives from the Department of Environmental Quality, and representatives of the District Seven Health Department concerning

a proposal made by Defendant SIPP, to expand the original septic sewer system which was then operating with more connections than that which was approved in the original septic permit within the Sunnyside Professional and Industrial Park. (See Waters Affidavit Exhibit "F".)

13. The proposed expansion was requested by Mr. Woolf and Mr. Beck on behalf of Defendant SIPP. During this meeting, several items were discussed between these parties concerning the current status of the septic system as it existed on that date. (See Waters Affidavit Exhibit "F".)

14. Following the meeting, on April 15, 2002, the District Seven Health Department provided a written letter to Kirk Woolf on behalf the Defendant SIPP, memorializing the meeting held on March 29, 2002, and setting forth the position of the District Seven Health Department. Specifically in this letter under paragraph six, the District Seven Health Department stated as follows:

No new connections will be allowed on the current sewer collection system until a Large Soil Absorption System, that replaces the current septic system, is approved and operating.

The District Seven Health Department then stated in paragraph eight, that Bonneville County would be informed that the current septic system connected to the sewer collection system is not adequate for any further connections. Then in paragraph seven, the District Seven Health Department specifically provided some alternatives to the Defendant SIPP, which would allow a new property owner to begin construction only if the new property owner would be installing their own individual septic system. (See Waters Affidavit Exhibit "F".)

15. On or about April 16, 2002, the Defendant SPU entered into an agreement with the Defendant SPOA for the providing of water and sewer services to the subdivision identified in the plat map, Exhibit "D." The name of this agreement is "Third Party Beneficiary Utility

Agreement.” (See Waters Affidavit Exhibit “G”).)

16. Pursuant to the terms and conditions of this Third Party Beneficiary Utility Agreement, the Defendant SPU is obligated to provide at all times for each building sewage service adequate for safe and sanitary collection and disposal of all sewage from said buildings. The agreement further obligates the Defendant SPU to make at its sole cost and expense any adjustment, repair, installation, or improvement to its facilities that shall be necessary, required or recommended by the State Board of Health to bring the operation of the sewer system to meet any applicable regulations or recommendations. (See Waters Affidavit Exhibit “G”).)

17. The Third Party Beneficiary Utility Agreement specifically identifies those third parties who are the beneficiaries of said agreement and identifies them to be any “present or future owner or occupant” of any or all of the properties, buildings, and other improvements that are then or thereafter will be served by the sewer systems operated and maintained by the Defendant Sunnyside Park Utilities, Inc. (See Waters Affidavit Exhibit “G”).)

18. In order to bind all present and future owners and occupants receiving sewer services from the Defendant Sunnyside Park Utilities, Inc., the Agreement contains specific language in several places indicating that the Third Party Beneficiary Utility Agreement would be recorded so as to put all persons on notice that any properties receiving sewer services would be subject to the terms of the Agreement and that the terms of the Agreement would become and would be classified as covenants, reservations, restrictions, or conditions, which would be imposed upon and would run with the land. . (See Waters Affidavit Exhibit “G”).)

19. At no time did the parties to the Agreement, which are the Defendants SPU and SPOA ever take any steps to actually record the Third Party Beneficiary Utility Agreement.

20. Prior to the construction or occupancy of the building that is occupied by Plaintiff,

Travis Waters, the president of the Plaintiff, saw a sign at the entrance of the subdivision announcing that the subdivision was named "Sunnyside Industrial and Professional Park." (See Waters Affidavit.)

21. Prior to the construction or occupancy of the building that is occupied by Plaintiff, Travis Waters, the president of the Plaintiff, reviewed the Plat Map (Exhibit "D") and saw that it was entitled "Sunnyside Industrial and Professional Park." (See Waters Affidavit.)

22. Prior to the construction or occupancy of the building that is occupied by Plaintiff, Travis Waters, the president of the Plaintiff, obtained and reviewed a copy of the Second Amended Declaration of Covenants, Conditions and Restrictions of Sunnyside Industrial and Professional Park (hereafter "CC&Rs"). The CC&Rs specifically state that the "general purpose and use of the lots . . . shall be that of a continued use of said lots for commercial and industrial purposes." The CC&Rs also state that the lots shall be used for "manufacturing and industrial enterprises . . ." (See Waters Affidavit Exhibit "H".)

23. From the descriptions set forth by the sign, the plat map and the CC&Rs Plaintiff believed that the Sunnyside Industrial and Professional Park would be an ideal location for his commercial printing business. (See Waters Affidavit.)

24. The Defendants SIPP, SPU and SPOA by and through their officer and/or member Doyle Beck agree that the purpose of the Sunnyside Industrial and Professional Park is for commercial and industrial purposes. (See Erickson Affidavit, Deposition pg 87, lines 3-17.)

25. In 2005, the Defendant SIPP was an active Idaho limited liability company with its members being Doyle Beck and Kirk Woolf. (See Erickson Affidavit, Exhibit "I".)

26. In 2005, the Defendant SPU was an active Idaho corporation with its officers being Doyle Beck and Kirk Woolf. (See Erickson Affidavit, Exhibit "J".)

27. In 2005, the Defendant SPOA was an active Idaho corporation with its officers being Doyle Beck and Kirk Woolf. (See Erickson Affidavit, Exhibit "K".)

28. Prior to the construction or occupancy of the building that is occupied by Plaintiff on or about early September 2005, Travis Waters, the president of the Plaintiff, personally met with Doyle Beck and/or Kirk Woolf the officers and/or members of the Defendants SIPP, SPU and SPOA to discuss the construction of the building. In these meetings and at the request of the Defendants SIPP, SPU and/or SPOA Plaintiff provided several versions of blueprints or drawings for the building that Plaintiff would occupy. (See Waters Affidavit.) (See Erickson Affidavit, Deposition of Doyle Beck pg 110, lines 19-25, pg 111 lines 1-24.)

29. During this meeting Travis Waters communicated to SIPP, SPU and SPOA through its officers and members Doyle Beck and Kirk Woolf that his business the Plaintiff Printcraft Press was going to occupy the premises after it was constructed. The Defendants SIPP, SPU and SPOA indicated that a sewer connection existed on the lot where the building would be constructed. (See Waters Affidavit.)

30. SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf understood that the business was owned by Travis Waters, that it was called Printcraft Press and that it was a printing business. (See Waters Affidavit; and Erickson Affidavit, Deposition of Doyle Beck pg 106, lines 22-24; pg 107, lines 15-22.)

31. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that its septic sewer system permit only allowed connections for "1 or 2 commercial buildings." (See Waters Affidavit.)

32. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA

by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that it already had seven or eight commercial buildings connected to its septic sewer system in violation of its septic sewer system permit. (See Erickson Affidavit, Deposition of Doyle Beck pg 120, lines 19-25, pg 121 lines 1-7.)

33. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that its septic sewer system consisted of only one 1000 gallon tank or that the capacity of this system was only 500 gallons per day. (See Waters Affidavit; See also Erickson Affidavit, Deposition of Doyle Beck pg 119, lines 2-20.)

34. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that the District Seven Health Department had issued a letter directly to Kirk Woolf and Doyle Beck on April 15, 2002, stating that:

No new connections will be allowed on the current sewer collection system until a Large Soil Absorption System, that replaces the current septic system, is approved and operating.

(See Waters Affidavit and Exhibit "L".)

35. At no time prior to Plaintiff's occupying the building did SIPP, SPU and SPOA by and through its officers and/or members Doyle Beck and Kirk Woolf ever disclose to Printcraft Press that the Third Party Utility Beneficiary Agreement or the Rules and Regulations existed or that the Defendants SIPP, SPU and SPOA were relying upon them. (See Waters Affidavit; See also Erickson Affidavit, Deposition of Doyle Beck pg 309, lines 1-25, pg 310, lines 1-21.)

36. On or about September 12, 2005, Plaintiff's preceding occupant,

CTR Development, LLC, paid to the Defendant Sunnyside Park Utilities, Inc., the sewer connection fee in the sum of \$1,800.00 by and through a payment of Check No. 5896. The Defendant SPU accepted this payment and provided or allowed the sewer connection to be made to the building that is currently occupied by the Plaintiff. (See Waters Affidavit Exhibit "M".)

37. On or about January 23, 2006, the owner of the property, who is identified as J&LB Properties, Inc., entered into a written Lease Agreement with CTR Management, LLC, with regard to leasing the premises. Thereafter, CTR Management, LLC entered into an oral sub-lease agreement with the Plaintiff. (See Waters Affidavit Exhibit "N".)

38. The understanding between J&LB, CTR and the Plaintiff was that the lessees would be responsible to pay for and obtain a sewer connection from the subdivision which had already occurred. (See Affidavits of Lawry Wilde (CTR Management) and Luke Boyle (J&LB Properties).)

39. On or after January 23, 2006, the Plaintiff moved from its previous building and began occupying the premises within the Sunnyside Industrial and Professional Park and operating its printing business. (See Waters Affidavit.)

40. In June of 2006, despite the prohibitions provided in writing by the District Seven Health Department to the Defendants there were approximately 10 or 11 sewer connections to the sewer system operated by the Defendant Sunnyside Park Utilities, Inc. One of these sewer connections was the Plaintiff, which connection would have been made on or around September of 2005. (See Erickson Affidavit, Deposition of Doyle Beck pg 101, lines 22-25, pg 102 lines 1-6.)

41. On or around early June 2006, the septic sewer system operated by the Defendant Sunnyside Park Utilities, Inc., failed. (See Waters Affidavit.)



42. On or about July 20, 2006, Kirk Woolf on behalf of the Defendants SIPP and SPU received a letter from the District Seven Health Department. This letter acknowledges the temporary expansion of the existing septic system by the Defendants, which was inspected and approved on July 2, 2006. The letter further goes on to restate the fact that the additional installation was temporary and to inform the Defendants that a permanent solution for the subdivision's central sewer system had to be proposed by them immediately to the District Seven Health Department for approval. (See Waters Affidavit Exhibit "O".)

43. On or about August 23, 2006, Doyle Beck on behalf of the Defendant SIPP and SPU provided a letter to Greg Crockett, the attorney for the District Seven Health Department. In this letter, the Defendants admit that the original system was designed to handle discharges only in the amount of 500 gallons per day. This letter further admits that as early as March of 2002, the sewer capacity was reaching 300 to 400 gallons per day, and that as a result of this, the Defendants sought permission from the District Seven Health Department to expand the original system at that time. (See Waters Affidavit Exhibit "P".)

44. The Defendants August 23, 2006, letter also states that the District Seven Health Department denied the Defendants' request to expand. According to the Defendants, the denial by the District Seven Health Department resulted in the failure of the sewer system which occurred in June 2006. (See Waters Affidavit Exhibit "P".)

45. However, in contradiction to the above letter, in this litigation the Defendants maintain that Plaintiff was the sole cause of the failure of the sewer system. (See Erickson Affidavit, Deposition of Doyle Beck pg 101, lines 16-25, pg 102 lines 1-6; and pg 103 lines 9-25, pg 104 lines 1-2.)

46. On September 13, 2006, Greg Crockett responded to Mr. Beck's previous letter

and other communications that had occurred regarding the issues set forth therein. In this letter, Mr. Crockett reminds the Defendants that the District Seven Health Department was very specific as to the requirements the Defendants would have to meet concerning the sewer system that existed within the development which were specifically set out in their April 15, 2002 letter, (Exhibit "L"). Additionally, Mr. Crockett also referred the Defendants to the original permit that was issued on August 15, 1996, which indicated specifically that that septic system would be designed for "one or two buildings only." (See Waters Affidavit Exhibit "Q".)

47. On or about September 6, 2006, the Defendants by and through Doyle Beck, sent to the Plaintiff a letter. In this letter, the Defendants list a number of chemicals used in Plaintiff's printing process, the information of which was provided to the Defendants by the Plaintiff. In this September 6, 2006 letter, the Defendants for the first time attempt to put the Plaintiff on notice that their intention was to only accept "human waste" and not handle any other types of discharges into the sewer system. The Defendants then blame the failure of the septic system to the discharges being made by the Plaintiff. The Defendants then state that they will not accept any waste other than human waste into their sewer facility. Finally, the Defendants state that had they known of the Plaintiffs' intention they would have advised them prior to their construction of their building. The Plaintiffs received this letter and were completely unaware of any of the prior correspondence, issues or demands that had existed and had been made by the District Seven Health Department to the Defendants. (See Waters Affidavit Exhibit "R".)

48. The Plaintiffs requested from the Defendants any and all documents, contracts, agreements, or the like having to do with the sewer utility services the Defendants were providing to Plaintiff.

49. On or about September 20, 2006, the Defendants sent a letter to the Plaintiff

enclosing a copy of the Third Party Beneficiary Utility Agreement and the Sunnyside Utilities' Rules and Regulations. This was the first time the Plaintiff had ever seen or been aware of the existence of the Third Party Beneficiary Utility Agreement or the Sunnyside Utilities' Rules and Regulations upon which the Defendants rely. (See Waters Affidavit and Exhibit "S").

50. On or about September 25, 2006, the Defendants and the Plaintiff met at the Plaintiff's premises to discuss the issues that had arisen and to attempt to resolve those issues. During the course of this meeting, the Plaintiff took the Defendants and their counsel around the premises and showed them each and every process, operation and station located within the premises. The Plaintiff was specific in showing the discharges that existed and the sources of those discharges. Several suggestions were made by the Defendants with regard to either eliminating those discharges or changing the location of those discharges. In the course of these discussions and the inspection which took place, the Plaintiff agreed to make arrangements to collect and dispose of what the Defendants identified as "processed waste". On or about September 26, 2006, Plaintiff's counsel memorialized the understanding from the meeting in a letter directed to the Defendants counsel. (See Waters Affidavit Exhibit "T").

51. Early in October 2006, after the Plaintiff had made the changes suggested by the Defendants, Kirk Woolf, an officer and/or member of the Defendants again met with the Plaintiff on its premises. They went through the building and inspected the changes and alterations made by the Plaintiff pursuant to the recommendations from the earlier meeting. At this meeting, after inspecting the changes, Mr. Woolf approved the changes which had been made. The only concern that Mr. Woolf raised at this meeting was with regard to the rinsing of trays which held ink that was used in the Flexo printing press area. The Plaintiff explained to Mr. Woolf that the inks used in the process that were rinsed from the trays were aqueous in nature and not harmful.

Mr. Woolf approved the alterations and changes that he had inspected and then left the building. Thereafter, Plaintiff operated its printing business as inspected and approved by the Defendants. (See Waters Affidavit.)

52. On October 2, 2006, the District Seven Health Department sent a letter to the Defendants. In this letter, the District Seven Health Department notified the Defendants that by connecting a third connection to the sewer system, when the original permit (Exhibit "A") prohibited more than 2 connections, the Defendants had specifically violated IDAPA Regulation 58.01.03.004.04 with regard to increased flows into an existing system. Essentially, the District Seven Health Department indicated that Defendants were not to have made any additional connections to the sewer system, and that in doing so, they had violated the permit that had been issued and applicable IDAPA regulations. (See Waters Affidavit Exhibit "U".)

53. A dispute arose between, the District Seven Health Department and the Defendants. This dispute involves many issues related to the septic sewer system to which Plaintiff was connected. On or about November 21, 2006, the District Seven Health Department issued a Corrected Notice of Intent to Reimpose Sanitary Restrictions to Kirk Woolf and Doyle Beck for and on behalf of the Defendants Sunnyside Industrial and Professional Park, LLC and Sunnyside Park Utilities, Inc. This Corrected Notice indicated that these Defendants were prohibited from further developing the property or making any additional changes or connections to the septic system as it existed and made reference to the Defendants' right to appeal this decision. (See Waters Affidavit Exhibit "V".)

54. On or about November 28, 2006, the District Seven Health Department issued the District Director's Decision with regard to a hearing requested by the Defendants concerning the reimposition of sanitary restrictions. In its decision, the District Director affirmed the

reimposition of the sanitary restrictions. (See Waters Affidavit Exhibit "W".)

55. Despite operating under the changes approved by the Defendants' officer and/or member Kirk Wolf, on December 11, 2006, the Defendants sent a demand letter to the Plaintiff alleging that the Plaintiff was in multiple violations of the Defendants' own rules and regulations and specifically setting a deadline in which they demanded the Plaintiff comply or that the Plaintiff's sewer service would be severed. (See Waters Affidavit Exhibit "X".)

56. On or about December 12, 2006, the Plaintiff responded to the Defendants' December 11, 2006 letter. The Plaintiff advised the Defendants about Mr. Woolf's inspection which occurred after the meeting and indicated that Mr. Woolf had personally come onto the premises and witnessed the remedial actions that had been taken by Printcraft Press. (See Waters Affidavit and Exhibit "Y".)

57. On or about December 13, 2006, the Defendants indicated that they were preparing to sever the sewer connection to the Plaintiff's premises, and that they intended to charge any and all cost associated therewith to the Plaintiff. In essence, in their December 13, 2006, letter, the Defendants blame the Plaintiff for each and every problem they were having with regard to their own inadequately designed and installed septic sewer system and their own violations in adding too many connections to the system. (See Waters Affidavit Exhibit "Z".)

58. On or about December 15, 2006, the Defendants severed the sewer connection to the Plaintiff. The Plaintiff was then forced to immediately provide emergency temporary facilities by way of Port-A-Potties to its employees and also an emergency 1,000 gallon tank was placed in the front of Plaintiff's business together with a pump and a pipe system in order to collect the sewage discharges from the Plaintiff's premises. (See Waters Affidavit.)

59. According to documents the Plaintiff obtained from the Defendants, the

Defendants' sewer system capacity from 1996 when it was first created and installed through June of 2006 was in the maximum amount of 500 gallons per day. These documents also indicate that the Defendants' sewer system capacity after June 2006 was in the total capacity of 2,000 gallons per day. (See Waters Affidavit Exhibit "AA".)

60. Had Plaintiff learned at any time from the Defendants of the limitations placed upon the Defendants by the original septic sewer system permit that allowed only "1 or 2 commercial building" connections, Plaintiff would never have leased it's original building and occupied the premises within the Sunnyside Industrial and Professional Park. (See Waters Affidavit.)

61. Had Plaintiff learned at any time from the Defendants that the Defendants' septic sewer system only consisted of one 1000 gallon tank with a daily capacity of only 500 gallons Plaintiff would never have moved from it's original building and occupied the premises within the Sunnyside Industrial and Professional Park. (See Waters Affidavit.)

62. Had Plaintiff learned at any time from the Defendants that the Defendants' septic sewer system already had seven or eight commercial buildings connected to it's inadequately sized septic sewer system in violation of its septic sewer system permit Plaintiff would never have moved from it's original building and occupied the premises within the Sunnyside Industrial and Professional Park. (See Waters Affidavit.)

63. Had Plaintiff learned at any time from the Defendants that the District Seven Health Department had issued a letter directly to Kirk Woolf and Doyle Beck on April 15, 2002, stating that

No new connections will be allowed on the current sewer collection system until a Large Soil Absorption System, that replaces the current septic system, is approved and operating.

Plaintiff would never have moved from it's original building and occupied the premises within the Sunnyside Industrial and Professional Park. (See Waters Affidavit.)

64. Had Plaintiff learned at any time from the Defendants that the Third Party Utility Beneficiary Agreement or the Rules and Regulations existed or that the Defendants SIPP, SPU and SPOA were relying upon them as a way to only accept "human waste" into their septic sewer system Plaintiff would never have moved from it's original building and occupied the premises within the Sunnyside Industrial and Professional Park because it would have known that such a limited sewer system would be inadequate for its needs. (See Waters Affidavit.)

## **ARGUMENT**

### **I. SUMMARY JUDGMENT STANDARD OF REVIEW**

Genuine issues of material fact exist in this case which preclude the granting of summary judgment in favor of any of the Defendants. Summary Judgment is appropriate, according to the Idaho Supreme Court, only when "... the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law." State v. Rubbermaid, 129 Idaho 353 (1996) citing to, McCoy v. Lions, 120 Idaho 765, 769 (1991). The non-moving party is entitled to have all the facts and all inferences thereto construed in a light most favorable to its position and against the moving party. Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

The burden of proving the absence of an issue of material fact rests at all times upon the moving party. Blickenstaff v. Clegg, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004). Summary Judgment cannot be entered on any issue where a genuine issue of fact exists. Idaho Rules of Civil Procedure, Rule 56(a); Myers v. A.O. Smith Harvester Products, Inc., 114 Idaho 432, 437

(Ct. App. 1988).

In the present case, the Defendants rely upon documents attached to Printcraft's Amended Complaint as well as the Affidavits of Kirk Woolf and Doyle Beck in seeking summary judgment on the causes of action raised by Printcraft. However, as set forth in the facts above and the argument below, genuine issues of material fact exist regarding Plaintiff's right to enforce the terms of the Third Party Beneficiary Utility Agreement, and as to the effect of the Defendants' failures to disclose material and pertinent information to the Plaintiff concerning the Defendants septic sewer system. Because genuine issues of material fact exist, summary judgment cannot be entered on any of the issues raised by the Defendants. For this reason, Plaintiff respectfully requests that the Court deny each and everyone of the motions for summary judgment of the Defendants SIPP, SPU and SPOA.

## **II. BREACH OF THIRD PARTY BENEFICIARY UTILITY AGREEMENT**

The record before the Court evidences both the applicability of and the breach by the Defendants of the Third Party Beneficiary Utility Agreement.<sup>1</sup> A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes a duty." Atwood v. Western Const., Inc., 129 Idaho 234, 238, 923 P.2d 479, 483, (Ct.App. 1996). A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Atwood, 129 Idaho at 238, 923 P.2d at 483.

Generally, Idaho courts will not permit a party to avoid its contractual obligations. Smith v. Idaho State University Federal Credit Union, 114 Idaho 680, 284, 760 P.2d 19, 23, (1988).

<sup>1</sup> Plaintiff acknowledges that the Defendant SIPP is not a party to the written Third Party Beneficiary Utility Agreement and therefore has no liability thereunder. However, as set out below, the Defendant SIPP was a party to the oral agreement and is liable thereon for breach by severing Plaintiff's sewer connection.



Idaho Courts have long held that “an agreement voluntarily made between competent persons is not lightly to be set aside . . . because it has turned out unfortunately for one party.” Stearns v. Williams, 72 Idaho 276, 283, 240 P.2d 833, 837 (1952).

A contract, made expressly for the benefit of a third person, is a third party beneficiary contract and may be enforced by the third party at any time before the parties thereto rescind it. I.C. § 29-102. To obtain third party beneficiary status, a plaintiff must be a stranger to the contract he is attempting to enforce. Sirius LC v. Erickson, 156 P.3d 539, 543 (Idaho 2007) citing, Corbin, Corbin on Contracts vol. 9, § 779, 27-28 (1979).

The question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The intention of the parties in this respect is determined by the terms of the contract as a whole. Idaho Power Company v. Hulet, 140 Idaho 110, 113, 90 P.3d 335, 338 (2004). The test for determining a party’s status as a third party beneficiary is whether the agreement reflects and intent to benefit the third party. The third party must show that the contract was made for his direct or primary benefit. The contract itself must express an intent to benefit the third party. Fenwick v. Idaho Department of Lands, 160 P.3d 757 (Idaho 2007).

The Defendants make three specific arguments to the Court in an attempt to convince the Court that Plaintiff is not entitled to bring a cause of action for breach of contract. First, Defendants argue that none of the Defendants breached the agreements. Second Defendants claim that Plaintiff breached the contract and that the Court’s July 5, 2007, Order, now somehow precludes Plaintiff from bringing an action for breach of contract. Finally, Defendants attempt to convince the Court that if the Third Party Beneficiary Utility Agreement does apply, Plaintiff does not qualify as an intended beneficiary and therefore cannot enforce the Agreement.

Defendants' first argument, that none of the Defendants breached the Agreements is without merit. Plaintiff's allegations in its First Amended Complaint allow plaintiff to litigate over the enforceability of both the Third Party Beneficiary Utility Agreement and the oral agreement between the parties.

As set forth above, Plaintiff was not aware of the existence of the Third Party Beneficiary Agreement until the Defendants provided a copy in September 2006 and therefore cannot be charged with breaching the Agreement before that time. (See Waters Affidavit Exhibit "S"; See also Erickson Affidavit Deposition of Doyle Beck pg.) Additionally, at the September 2006 meeting, the Defendants inspected Plaintiff's entire building and requested that Plaintiff make certain changes in its discharges to the sewer system. (See Waters Affidavit.) Plaintiff made the requested changes. In October 2006, the Defendants, by and through its officer and/or member Kirk Woolf inspected and approved the changes that were made by the Plaintiff. (See Waters Affidavit.) Thereafter, Plaintiff operated its printing business as inspected and approved by the Defendants for two months without incident. (See Waters Affidavit.)

Despite continuing to operate under the changes approved by the Defendants' on December 11, 2006, the Defendants sent a demand letter to the Plaintiff alleging that the Plaintiff was in multiple violations of their Agreements. (See Waters Affidavit.) Plaintiff reminded Defendants of the approval it had obtained by the Defendants through Woolf. However, Defendants still chose to sever Plaintiff's sewer connection and in doing so breached the Agreements that existed between the parties. (See Waters Affidavit.) These facts, as supported by the record refute the allegations of the Defendants that they did not breach the Agreements. For this reason, summary judgment cannot be granted on this issue.

Likewise, Defendant's second argument that Plaintiff breached the terms of the original

Third Party Beneficiary Utility Agreement and therefore is not entitled to enforce the Agreement must fail. As set forth above, at the September 2006 meeting, the Defendants inspected Plaintiff's entire building and requested that Plaintiff make certain changes in its discharges to the sewer system. (See Waters Affidavit.) Plaintiff made the requested changes. In October 2006, the Defendants, by and through its officer and/or member Kirk Woolf inspected and approved the changes that were made by the Plaintiff. (See Waters Affidavit.) Thereafter, Plaintiff operated its printing business as inspected and approved by the Defendants for two months without incident. (See Waters Affidavit.) It is disingenuous for the Defendants to approve the changes made by the Plaintiff on one hand and then, at a later date, to claim that these same changes constitute a breach of the Agreements.

In a similar vein, the argument made by the Defendants that the Court's July 5, 2007, Order preclusively establishes that Plaintiff breached the Agreements or that this Order precludes the Plaintiff from bringing an action for breach of contract cannot prevail. In the same Order the Court granted Plaintiff's motion to amend its complaint. A copy of the proposed amended complaint was provided. In this proposed amended complaint Plaintiff alleges the same facts set forth above which are: (1) that the parties met in September 2006; (2) that at this meeting the Plaintiff agreed to make certain changes to its sewage discharge which were in fact made by Plaintiff; (3) that in October 2006, the Defendants approved the changes made by the Defendants; (4) that over 2 months passed afterwards with no problems or complaints by the Defendants; and (5) that the Defendants then severed Plaintiff's sewer connection. If the July 5, 2007 Order from the Court had the preclusive effect claimed by the Defendants, the Court would not have granted Plaintiff's motion to allow it to amend its complaint. The Defendants argument on this matter must fail.

Additionally, the final argument made by the Defendants, that Plaintiff does not qualify as an intended beneficiary is also without merit. There is no ambiguity in the language of the Third Party Beneficiary Utility Agreement. The title to the Agreement makes it clear that there has to be a third party somewhere. Printcraft is an "occupant" as defined by the strict language of the Agreement itself and is therefore an intended beneficiary. (See Water's Affidavit, Exhibit "G", Section 1(a); and Section 10(b).)

Defendants argue that a third party beneficiary must fall within a "limited class" and that Plaintiff does not fit into that class in this instance. Under the Defendants argument no one in the Sunnyside Professional and Industrial Park would be an intended beneficiary despite the title of the Third Party Beneficiary Agreement or the language contained therein. Defendants' argument that Plaintiff is not an intended beneficiary is not supported by the applicable law or the very Agreement that creates this right and, as a result, must fail.

For the facts and reasons set forth above, which are supported by the record before the Court, the Defendants should not be granted summary judgment on Plaintiff's breach of contract claims.

### **III. FRAUD AND/OR MISREPRESENTATION**

As with its claims concerning Plaintiff's breach of contract causes of action, the Defendants motions for summary judgment on Plaintiffs claims of fraud and/or misrepresentation must also fail. Rule 9(b) of the Idaho Rules of Civil Procedure (I.R.C.P.) requires that fraud be "stated with particularity" in a parties' pleadings. I.R.C.P. 9(b). According to the Idaho Supreme Court, the primary elements of fraud or misrepresentation are: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its

falsity; (5) the speaker's intent that the representation will be acted upon in a reasonably contemplated manner; (6) the listener's ignorance of its falsity; (7) the listener's reliance on the truth of the representation; (8) the listener's right to rely on the truth of the representation; and (9) the listener's consequent and proximate injury. Faw v. Greenwood, 101 Idaho 387, 613 P.2d 1338 (1980).

However, the Idaho Supreme Court holds that a misrepresentation claim should not be analyzed only with reference to the elements recited in Faw. See, Tusch Enters. v. Coffin, 113 Idaho 37, 41-42, 740 P.2d 1022, 1026-27 (1987). In Tusch, the Idaho Supreme Court specifically stated:

It must also be considered whether the facts fall within the category of cases finding a misrepresentation on the basis of nondisclosure. To say that all fraudulent misrepresentation must fit within Faw's nine-element formulation misconstrues the very nature of fraud. "Fraud vitiates everything it touches. It is difficult to define; there is no absolute rule as to what facts constituted [sic] fraud; and the law does not provide one 'lest knavish ingenuity may avoid it.'" Massey-Ferguson, Inc. v. Bent Equipment Company, 283 F.2d 12, 15 (5th Cir.1960). "[T]he law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity." *Id.* The varied forms of fraud are also illustrated by the Restatement (Second) of Torts §§ 526-530, and 551 (1977).

See, Tusch, 113 Idaho at 41-42, 740 P.2d at 1026-27 and fn 1. Restatement (Second) of Torts § 551 (1977) provides in pertinent part:

§ 551. Liability for Nondisclosure

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

See, Tusch, 113 Idaho at 42, 740 P.2d at 1026-27, fn 2.

In the present case, with regards to Printcraft's causes of action for fraud, constructive fraud and misrepresentation in its Amended Complaint, the Defendants have only raised a few

arguments. First the Defendants claim that none of them had any duty to disclose any information to Printcraft. Second, the Defendants argue that none of this information was material to whether Printcraft decided to occupy the building. Third, the Defendants also argue that Printcraft did not actually rely upon the nondisclosures to occupy the premises. Finally, the Defendants argue that none of the damages Printcraft suffered were the result of the nondisclosures of the Defendants. For the convenience of the Court, Printcraft will address each of these issues separately below.

**A. Duty to Disclose**

As set forth above fraud may be established by silence where the defendant has a duty to speak. A duty to speak arises in situations where the parties do not deal on equal terms or where information to be conveyed is not already in the possession of the other party. According to the Supreme Court of Idaho,

A duty to disclose may arise when (a) a party to a business transaction is in a fiduciary relationship [or other similar relationship of trust and confidence] with the other party; *or (b) disclosure would be necessary to prevent a partial or ambiguous statement of fact from becoming misleading; or (c) subsequent information has been acquired which a party knows will make a previous representation untrue or misleading; or (d) a party knows a false representation is about to be relied upon; or (e) a party knows the opposing party is about to enter into the transaction under a mistake of fact and because of the relationship between them or the customs of trade or other objective circumstances would reasonably expect a disclosure of the facts.*

Watts v. Krebs, 131 Idaho 616, 620962 P.2d 387, 391 (1998) (italics added).

In the present case, the Defendants duty to disclose to the Plaintiff arises under several circumstances. First, the explicit language and terms of the Third Party Beneficiary Agreement itself creates a duty of disclosure upon the Defendant SPU. The Third Party Beneficiary

Agreement specifically states that it would be recorded “as is required by Idaho law to put all persons on notice that such properties have been subjected to the terms of this Agreement.” (See Waters Affidavit Exhibit “G”, page one recitals; Section 10(a).) By the terms of the Agreement Defendants SPU and SPOA were required to disclose the existence of the Agreement and the Rules and Regulations by recording them. This never happened and neither Printcraft nor its predecessor owners or occupants were ever aware of the existence of these documents and the limitations they contained concerning the sewer system operated by the Defendant until after Plaintiff already occupied the premises. (See Waters Affidavit; See also Affidavits of Luke Boyle, Mark Miskin, Travis Waters (Waters Land and Cattle), and Lawry Wilde (CTR Development).)

Additionally, under the statement of law set forth above, other actions taken by the Defendants create a duty for them to disclose to all the potential owners and occupants the true nature of the sewer system that existed so as to eliminate partial or ambiguous statements of fact from becoming misleading. For example, the Defendant SIPP placed a sign at the entrance of the subdivision advertising it as “Sunnyside Professional and *Industrial* Park.” (See Waters Affidavit.) (Italics added.) This sign, all by itself, led Plaintiff to believe that “industrial” businesses using “industrial” processes were and could be occupants of the subdivision. (See Waters Affidavit.)

Furthermore, both the Plat map and the CC&Rs which were created and recorded for the subdivision by the Defendants SIPP and SPOA specifically indicate that the name of the subdivision was “Sunnyside Professional and Industrial Park.” Prior to the construction or occupancy of the building that is occupied by Plaintiff, Travis Waters, the president of the Plaintiff, obtained and reviewed a copy of the Plat map and the CC&Rs. The CC&Rs

specifically state that the “general purpose and use of the lots . . . shall be that of a continued use of said lots for *commercial and industrial purposes*.” (Italics added.) The CC&Rs also state that the lots shall be used for “*manufacturing and industrial enterprises . . .*” (See Waters Affidavit Exhibit “H”).(Italics added.)

These two items also create the very ambiguity contemplated by Krebs, that requires additional disclosure by the Defendants in order to avoid misleading occupants of the subdivision about what is and what is not allowed as a sewer discharge. From the descriptions and language set forth by the sign, the plat map and the CC&Rs Plaintiff believed that the Sunnyside Industrial and Professional Park would be an ideal location for his commercial printing business. (See Waters Affidavit.)

It is also important to note that the CC&Rs that are currently in effect were recorded on July 18, 2002. The recording of the CC&Rs by the Defendants occurred just 2 months *after* the Defendants received the April 15, 2002, letter from the District Seven Health Department where the Defendants were specifically prohibited from adding new sewer connections. (See Waters Affidavit, Exhibits “F” and “H”.) Regardless of whether the Defendants believed the District Seven Health Department had authority to make such a prohibition, all potential owners or occupants such as Plaintiff should have been told about the prohibition so they could decide whether they wanted to proceed despite the prohibition. The prohibition in this letter constitutes, “information that has been acquired which a party knows will make a representation untrue or misleading.” In other words, the very prohibition made by the District Seven Health Department itself created a duty of disclosure to the Defendants.

Finally, the Defendants all participated through their officers and/or members Kirk Woolf and Doyle Beck in meetings with the Plaintiff before the building Plaintiff occupies was even



constructed. (See Waters Affidavit.) In these meetings the Defendants reviewed the blueprints or drawings for the building. The Defendants also knew that the Plaintiff employed 40 employees, and that it was a commercial printing business named Printcraft Press. (See Waters Affidavit.) The Defendants knew that the Plaintiff was unaware of the existence of the prohibitions and limitations that existed. (See Waters Affidavit.) This is the exact type of circumstance contemplated by Tusch. However, the Defendants simply said nothing.

As set forth above and as supported by the record, the Defendants failed to disclose numerous items of information from the Plaintiff for which a duty to disclose existed. As a result, summary judgment cannot be granted in favor of the Defendants on this issue.

#### **B. Materiality**

The information the Defendants failed to disclose to Plaintiff was material. Materiality refers to the importance of the misrepresentation in determining the plaintiff's course of action. The test for materiality can be either subjective or objective. According to the Restatement (Second) of Torts a representation is "material" if:

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Watts v. Krebs, 131 Idaho 616, 619-20, 962 P.2d 387, 390-91 (1998), citing, Restatement(Second) of Torts § 538(2) (1977).

In the present case, the record before the Court establishes that prior to occupying the premises within the Sunnyside Professional and Industrial Park, Plaintiff was not aware of

(1) the limited size of the Defendants' sewer system, (2) the limitations placed upon the Defendants by the District Seven Health Department's septic system permit, (3) the limitations and prohibitions concerning new connections to the sewer system as set forth in the District Seven Health Department's April 15, 2002, letter, (4) the fact that before it made its connection there were already seven to eight other buildings already connected to the Defendants' limited sewer system; (5) the fact that as early as March 2002, the Defendants' sewer system was almost maxed out in the discharges it was receiving; or (6) the existence of the Agreement or Rules or Regulations claiming that only "human waste" would be accepted into the sewer system. (See Waters Affidavit.)

The record before the Court also establishes that prior to Plaintiff's occupying the premises within the Sunnyside Professional and Industrial Park, the Defendants were aware of these things. Finally, the record before the Court establishes that prior to Plaintiff's occupying the premises within the Sunnyside Professional and Industrial Park, the Defendants met with the Plaintiff and had an opportunity to disclose the information to the Plaintiff but did not.

According to the statement of law concerning materiality, the Court must determine whether Printcraft would have attached importance to the existence or nonexistence of the information the Defendants failed to disclose in determining whether to occupy the premises within the Sunnyside Professional and Industrial Park. The Plaintiff has testified that had it known of any of these things it would not have moved from its previous building and occupied the premises. (See Waters Affidavit.) Plaintiff would not have done so because Plaintiff would have known that the Defendants' limited sewer system would have been inadequate for its purposes. (See Waters Affidavit.)

The Defendants attempt to convince the Court that the disclosures the Defendants failed

to make were not material because of the written lease agreement that exists between the owner J&LB Properties and its lessee CTR Management. According to the Defendants the written lease states that J&LB as the landlord is not responsible to provide sewer services under the lease. The Defendants claim that as a result, Plaintiff “was not given any right to sewer service as a provision of the sub-lease.” This argument is meaningless as to whether Defendants’ failed disclosures to Plaintiff are material. As set forth above, Plaintiff was informed by Defendants, *prior* to the construction of the building, that a sewer connection existed. Defendants knew that Plaintiff would occupy the building and operate its printing business there. Additionally, the understanding between J&LB, CTR and the Plaintiff was that the lessees would be responsible to pay for and obtain a sewer connection from the subdivision. (See Affidavits of Lawry Wilde (CTR Management) and Luke Boyle (J&LB Properties).)

For these reasons, materiality is established and Defendants cannot be granted summary judgment on this issue. As a result, Plaintiff respectfully requests the Court deny Defendants’ motions for summary judgment.

### **C. Reliance**

Plaintiff did in fact rely upon the Defendants’ non-disclosures in choosing to occupy the premises. A party has a right to rely upon another’s duty to disclose. The issue of a party’s reliance upon another’s duty to disclose is well illustrated by Watts v. Krebs, 131 Idaho 616, 962 P.2d 387 (1998). In Krebs, the plaintiff and defendant were divorced. The divorce decree provided that they would hold two parcels of real property as tenants in common. Krebs, 131 Idaho at 618, 962 P.2d at 389. The decree ordered that the property be sold and the proceeds be used to satisfy the parties’ community debts. Rather than selling the property the parties agreed

to partition it and entered into a written agreement to do so. Id. However, prior to entering into the agreement, the defendant husband logged a portion of the property that by the partition agreement would belong to the plaintiff wife. The defendant husband never disclosed to the plaintiff wife his logging activities. Id. Nor did he disclose to her that he had obtained a sum of money from the sale of the timber he had logged. Id.

After executing the partition agreement the plaintiff wife learned about the defendant husband's logging actions. The plaintiff wife filed a complaint against the defendant husband alleging that he had fraudulently induced her to enter into the partition agreement by failing to disclose to her his actions. Id. 131 Idaho at 619, 962 P.2d at 390. The trial court held that the defendant husband was guilty of fraud by inducing the plaintiff wife to partition the property without disclosing that he had logged it. The defendant husband appealed arguing, *inter alia*, that because he had made no affirmative misrepresentations the plaintiff wife could not rely on his failure to disclose. Id. Additionally, the defendant husband argued that the plaintiff wife could not rely on his failure to disclose because she had an opportunity to investigate and discover the truth about the property prior to entering into the partition agreement. Id.

The Idaho Supreme Court upheld the trial court's decision. According to the court, a party has a right to rely upon another's duty to disclose all material facts within their knowledge that may be important to that party's decision. Id. 131 Idaho at 621, 962 P.2d at 392. Additionally, the Idaho Supreme Court held that even assuming a party could have discovered the truth of the material fact by investigating, the party's failure to investigate does not negate their right to rely upon the other party's duty to disclose all material facts concerning the matter. Id.

In the present case the Defendants make the same arguments that were made by the

defendant husband in Krebs. First, the Defendants argue that Printcraft never investigated the facts or made any disclosures to the Defendants and therefore had no right to rely upon the Defendant to make disclosures to them. (See Defendant SPU's Brief in Support of Motion for Summary Judgment page 13.) As set forth in Krebs, Plaintiff was under no duty to make any investigations. The responsibility of disclosure rests upon the parties with knowledge of the information that must be disclosed, which in this case was the Defendants. For this reason, this portion of the Defendants' arguments must fail.

Second, the Defendants claim that Printcraft in fact did not rely upon any failed non-disclosures from the Defendants. This is refuted by Plaintiff's testimony and the record before the Court. As set forth above, Plaintiff was not aware of (1) the limited size of the Defendants' sewer system, (2) the limitations placed upon the Defendants by the District Seven Health Department's septic system permit, (3) the limitations and prohibitions concerning new connections to the sewer system as set forth in the District Seven Health Department's April 15, 2002, letter, (4) the fact that before it made its connection there were already seven to eight other buildings already connected to the Defendants' limited sewer system; (5) the fact that as early as March 2002, the Defendants' sewer system was almost maxed out in the discharges it was receiving; or (6) the existence of the Agreement or Rules or Regulations claiming that only "human waste" would be accepted into the sewer system. (See Waters Affidavit.) Had the Plaintiff been made aware of any of these things it would not have proceeded with occupying the building and this entire litigation would not exist.

Plaintiff did rely upon the Defendants and the Defendants failed to make the required disclosures. For this reason, Defendants' motions for summary judgment on this issue should fail and the Court should deny said motions.

#### **D. Damages**

Plaintiff is entitled to recover its damages as set forth in its First Amended Complaint. Idaho courts have applied the “out-of-pocket” rule in measuring damages in fraud claims, but have also recognized the existence of a different measure of damages referred to as the “benefit of the bargain” rule. Watts v. Krebs, 131 Idaho 616, 621, 962 P.2d 387, 392 (1998), citing, Weitzel v. Jukich, 73 Idaho 301, 308, 251 P.2d 542, 546 (1952). The two rules are not exclusive. Id. The underlying principle is that the victim of fraud is entitled to compensation for every wrong which is the natural and proximate result of the fraud. Id. The measure of damages which should be adopted under the facts of a case is the one which will effect such result. Id.

With regard to damages, the Defendants only again argue that Plaintiff's sewer connection was severed by the Defendants only because Plaintiff was violating the agreements. However, as set forth above, this argument cannot prevail.

As set forth above, at the September 2006 meeting, the Defendants inspected Plaintiff's entire building and requested that Plaintiff make certain changes in its discharges to the sewer system. (See Waters Affidavit.) Plaintiff made the requested changes. In October 2006, the Defendants, by and through its officer and/or member Kirk Woolf inspected and approved the changes that were made by the Plaintiff. (See Waters Affidavit.) Thereafter, Plaintiff operated its printing business as inspected and approved by the Defendants for two months without incident. (See Waters Affidavit.) It is disingenuous for the Defendants to approve the changes made by the Plaintiff on one hand and then, at a later date, to claim that these same changes constitute a breach of the Agreements. Defendants cannot claim that they had a right to sever Plaintiff's sewer connection when Plaintiff was operating under Defendants' approval.

As a result, this argument cannot stand and summary judgment should not be granted to Defendants on this issue.

### CONCLUSION

For the reasons set forth above, which are supported on the record before the Court, summary judgment should not be granted to the Defendants. Plaintiff is entitled to and should be allowed to pursue its causes of action at trial.

DATED this 2<sup>nd</sup> day of August, 2007.

RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHARTERED

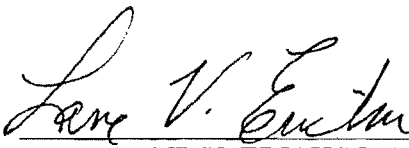
By:   
LANE V. ERICKSON

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Mark R. Fuller  
410 Memorial Dr, Ste 201  
PO Box 50935  
Idaho Falls, ID 83405-0935

<input checked="" type="checkbox"/>	U. S. Mail
<input checked="" type="checkbox"/>	Postage Prepaid
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile

  
LANE V. ERICKSON